Supreme Court, U.S.
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No. 93-1860

In The

Supreme Court of the United States

October Term, 1993

Austex, Ltd., Munday Enterprises, Al Edwards, Tom Allen, Centennial Mortgage, et al.,

Petitioners,

v.

State of Texas and City of Austin,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Just Compensation Clause permit the State to condemn property and pay as compensation a fraction of the consideration which the landowner would have received had he sold the property to a private purchaser for the same use, in a *fair market* transaction?

May the State apply differing definitions of *Just Compensation* within that class of citizens entitled to protection under the Takings Clause without offending the Due Process and Equal Protection requirements of the Fourteenth Amendment?

LIST OF PARTIES

The claims of the Petitioners are consolidated because they involve identical questions of fact and law. Supreme Court Rules 12(2). The following is a complete list of the Parties as they appeared before the supreme court of Texas:

PETITIONERS

No. D-1509
Austex, Ltd., A Nevada Corporation
c/o Mr. Richard Prokup
M & J Wilkow
180 N. Michigan Ave., Suite 2000
Chicago, Illinois 60601

No. D-2296
Munday Enterprises
William F. Munday
6202 Cat Mountain Cove
Austin, Texas 78746

No. D-3627
Donnie Ruth Moore Edwards
Individually and as Independent
Executrix of the Estate of
Alfred Cornelius Edwards and
Alfred C. Edwards, Jr.
8401 Research Blvd.
Austin, Texas 78758

No. D-4071
Thomas T. Allen and wife, Kathy Allen
Jane Allen Fish, f/k/a Jane Allen Barndt and husband, Richard Fish
c/o Thomas T. Allen
12343 Hymeadow #214
Austin, Texas 78750

These Petitioners have been represented by current Counsel of record throughout these proceedings.

No. D-3773
Centennial Mortgage Corporation,
c/o FGB Realty Advisers, Inc.
14651 Dallas Parkway, Suite 200
Dallas, Texas 75240

This Petitioner has previously been represented by:
Ms. Susan Vincent
JENKINS & GILCHRIST
One American Center, Suite 2200
600 Congress
Austin, Texas 78701-3215

RESPONDENTS

The Respondents were the condemnors/appellants below, the State of Texas and its political subdivision the City of Austin, a home rule city in Travis and Williamson Counties, Texas.

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State of Texas and City of Austin,

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Petition for Writ of Certiorari to the Supreme Court of the State of Texas

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PETITION FOR WRIT OF CERTIORARI

Austex, Ltd. and the other Petitioners respectfully request that the Court issue a Writ of Certiorari to review and correct various Judgments rendered and published by the Texas supreme court on October 27, 1993, and subsequent dates.

OPINIONS OF LOWER COURTS

The opinion of the Texas supreme court in *State of Texas and City of Austin v. Austex, Ltd., et. al.* is reported in conjunction with a companion case, *State v. Schmidt*, 867 S.W.2d 769 (Tex. Oct. 27, 1993). The *Schmidt* landowners are not parties to this petition. The opinion reversed and rendered the holding of the Austin court of appeals, *State v. Austex, Ltd.*, 862 S.W.2d 1 (Tex. App. Austin--1991). Austex's Motion for Rehearing was overruled by the Texas supreme court on February 2, 1994. The lower court's order and opinions are reproduced at Appendix A4-68.

The opinion in *State and City v. Munday Enterprises*, 868 S.W.2d 319 (Tex. Nov. 24, 1993) reversed and remanded the ruling in *State v. Munday Ent.*, 824 S.W.2d 643 (Tex. App.--Austin 1992). The Motion for Rehearing was overruled on February 2, 1994. The order and opinions below are at Appendix A69-110.

The opinion in *State v. Edwards*, 868 S.W.2d 321 (Tex. Nov. 24, 1993) reversed and rendered *State v. Edwards*, 867 S.W.2d 380 (Tex. App.--Austin, 1992). The court overruled the Motion for Rehearing on February 2, 1994. The order and opinions below are at Appendix A111-123.

The opinion in *State v. Allen*, 870 S.W.2d 1 (Tex. Jan. 5, 1994) reversed and remanded *State v. Allen*, 854 S.W.2d 228 (Tex. App.--Austin 1993). The Motion for Rehearing was overruled on March 9, 1994. The order and opinions below appear at Appendix A124-152.

The opinion in *State v. Centennial Mortgage*, 867 S.W.2d 783 (Tex. Nov. 24, 1993) reversed and remanded *State v. Centennial Mortgage*, 867 S.W.2d 382 (Tex. App.--Austin 1991). The Motion for Rehearing was overruled on February 2, 1994. The order and opinions of the lower courts are at Appendix A153-171.

STATEMENT OF JURISDICTION AND RIPENESS

This petition seeks review of final judgments of the supreme court of the State of Texas, the highest State civil court from which relief can be sought or had. Each case involves claims arising under the United States Constitution which have been finally resolved adversely to the Petitioners. The Court has jurisdiction to review these cases by virtue of 28 U.S.C. § 1257 (a).

The Texas high court reversed and rendered in *Austex* and *Edwards* and these judgments are final for all purposes except this petition. The *Munday, Allen*, and *Centennial* cases have been remanded for further proceedings in the State trial court. However, the Texas supreme court has *sub silentio* overruled the Federal Constitutional claims of these litigants as well. The cases were remanded for retrial on a measure of damages which cannot render the constitutional claims moot. Further state litigation will not result in just compensation and will be futile. These cases should be

treated as ripe for purposes of this petition and should be considered on their merits with the indistinguishable final holdings in *Austex* and *Edwards*. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition implicates the Fifth Amendment which provides, in pertinent part, as follows:

> **[No person shall ...] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**

The petition also makes claim under the following applicable provisions of the Fourteenth Amendment:

> **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

These actions were initiated under Chapter 21 of the Texas Property Code. Sections 21.041 and 21.042 prescribe the evidentiary parameters and the measure of

damages for condemnation cases. The applicable provisions are reproduced at Appendix A-2, A-3.

STATEMENT OF APPLICABLE FACTS

The Petitioners bought commercial properties abutting U.S. 183, the primary traffic arterial in northwest Austin, Texas. This facility was a six-lane divided roadway at grade with adjacent properties. It carried about 70,000 cars per day and provided abutting owners with superb commercial exposure and access.

The State and City decided to convert the road to a limited access freeway. Upon completion, the main traffic lanes will be continuously elevated from thirty to fifty-five feet above the Petitioners' remainder properties, which will only be accessed by one way feeder roads. The taking of frontage strips from each Petitioner was essential to the project and these cases ensued. The parties joined issue on one question of fact: the proper amount of damages.

The landowners proved that their remaining properties would be reduced in value by years of construction and that after the freeway was completed, their valuable commercial exposure and access would be lost. The government objected to this evidence. It also offered testimony that these changes would not diminish the market value of the Petitioners' remaining properties. Each jury rejected the government's evidence and found damages substantially in excess of its estimate. A table summarizing the case histories appears at Appendix A-1.

On appeal, the State conceded that the verdicts were supported by the evidence. It thereby acknowledged that each remainder property had suffered permanent reduction in its market value "considering the effect of the condemnation." Nevertheless, the State claimed that Petitioners should not be paid for the taking of their exposure and access or for the damages arising from the

roadway construction because these injuries are "community" and therefore "non-compensable."

In a series of opinions, the Austin court of appeals rejected these arguments and affirmed the judgments. The court held that adoption of the State's position would allow unconstitutional under-compensation. The argument was also rejected as contrary to well-established Texas precedent.

After protracted deliberations, the Texas supreme court reversed the judgment in *Austex* and rendered judgment that the landowner recover only the value of the land taken as if severed from the whole. Shortly thereafter, the court issued *per curiam* opinions reversing similar judgments in the other cases. These opinions announced that in partial taking cases construction damages and loss of visibility and accessibility would hereafter be treated as "generally non-compensable." In each case the reasoning and holding in *Austex* was incorporated by reference. The Petitioners immediately

asserted claims under the U.S. Constitution by motion for rehearing. These motions were overruled without comment and this petition followed.

REASONS FOR GRANTING THE WRIT

I. THE RULE OF DAMAGES ANNOUNCED BY THE TEXAS SUPREME COURT DOES NOT AFFORD THE PETITIONERS JUST COMPENSATION AND OFFENDS THE MINIMUM REQUIREMENTS OF THE FIFTH AMENDMENT.

Just compensation must make the condemnee whole. Our Constitution demands "the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1942).

To insure full indemnification, American courts have adopted the *market value* measure of damages. If an entire property is taken, its owner must be paid enough money to acquire a new one of equal value and utility. If only a part of his land is acquired, the owner must be able to sell his remainder in the free market,

take the compensation paid him by the government, and with the sum purchase a new whole property of value equal to his original holding. Thus the owner receives "the full and exact equivalent" for the property taken and the constitutional mandate is satisfied. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1892).

The material facts are not in dispute. "The State does not deny that the market value of the Schmidt and Austex tracts has diminished, nor does it challenge the amount of that diminution as found by the jury in each case." *Austex, supra* 867 S.W.2d at 773. The court also agreed that in a transaction between private owners, the price for the land would "cover the value of the parcel sold as well as the loss in the value of the remainder occasioned by the buyer's use of his own property." *Austex, supra.* 867 S.W.2d at 776. The court simply decided that this basic axiom of the market place would not apply "when the buyer is the State." *Id.* By fiat, the State is granted a privileged status as purchaser of land.

It may now plan public improvements and seize its citizens' property without fully accounting for the taking of private lands. This is the very result the Takings Clause was designed to prohibit.

The only Constitutional precedent cited for this ruling is *Campbell v. United States*, 266 U.S. 368 (1924), and two lower court opinions which purport to have modified it, *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982), cert denied, 460 U.S. 1041 (1983); and *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961). The Court should take this opportunity to more fully explain and develop the meaning of *Campbell* because it has been misunderstood by the courts which have applied it and the commentators who have criticized it alike.

The holding in *Campbell* was driven by its unique facts. The War Department abandoned its plans to construct a huge munitions factory and sold most of the land it had appropriated to industrial users who could

benefit from the infrastructure which had been built. Campbell complained because increased industrialization of the area made his property less attractive as a farm. This Court affirmed an award for the value of the land taken *and for the damages to the remainder because of the taking*. The Court refused to allow additional damages due to the industrial uses being made of properties which the Army had previously taken from others and then sold to private entities. *Campbell* at 369.

The Petitioners in this case have never sought to recover for community-wide changes in land use. They are attempting to recover for diminution in the value of their properties directly occasioned by the construction and operation of the proposed public improvement. These traditional remainder damages were specifically allowed in *Campbell*. Because its unique fact situation has not been repeated, *Campbell* has never been cited by This Court as a dispositive precedent. Nevertheless, some local governments have seized on the holding in

routine cases to justify the payment of less than full compensation, ignoring several of The Court's more recent mainstream condemnation precedents.

In many States the conflict between demand for public improvements and unwillingness to pay higher taxes has become critical. On several occasions The Court has been required to enforce local government's obligation to pay for a "taking." Frustrated in this tactic, Texas and some of her sister States now seek to redefine "just compensation" to suit their own fiscal ends. If these decisions are allowed to stand, the Court can anticipate many future petitions from citizens of States encouraged by these precedents.

In these five cases alone, the State's proposed result leaves uncompensated more than $7,000,000 in admitted injuries. The issue is not whether these losses have occurred, but who will be required to bear them. The Texas supreme court has held that they should be cast upon the landowners unfortunate enough to abut the

new roadway rather than allocated among the millions of citizens who will use and enjoy it. This conclusion is manifestly offensive to the essence of the Fifth Amendment which is "designed to bar government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Court should clarify its decision in *Campbell* and reinstate full application of the market value test to determine just compensation.

II. THE TEXAS CONDEMNATION STATUTE, AS APPLIED TO THESE PETITIONERS, DENIES EQUAL PROTECTION OF THE LAW.

Where an express constitutional right is implicated, unequal treatment within a protected class will only be tolerated after strict judicial scrutiny and upon a showing of compelling state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

Under Texas law, a property owner whose land is totally acquired for this project will recover its full fair

market value. Compensation must exclude any increase in value caused by the public project itself but otherwise the owner may make proof of any factor which would reasonably be given weight in the negotiations between willing buyer and willing seller. *City of Fort Worth v. Corbin,* 504 S.W.2d 828, 831 (Tex. 1974), TEX. PROP. CODE ANN. § 21.042(b). (Appendix A-2).

In a partial taking case, the landowner's damages are defined by the difference between the fair market value of his whole property and the fair market value of his remaining land, giving consideration to the effects of the condemnation. *Westgate, Ltd. v. State,* 843 S.W.2d 448, 457 (Tex. 1992); TEX. PROP. CODE ANN. § 21.042(c). (Appendix A-3). In the cases at bar, the Texas supreme court prescribes a modified definition of *fair market value* applicable only to remainder properties in condemnation cases. Although exposure and accessibility are admittedly crucial factors in establishing the market value of commercial property, loss of these

attributes must be ignored in partial taking cases because these damages have been declared "generally non-recoverable." *Centennial Mortgage, supra.*, 867 S.W.2d at 783.

The resulting anomaly is readily apparent. The landowner whose property is totally acquired will be fully compensated for the valuable commercial exposure and accessibility he has lost. The Petitioners have lost these qualities just as surely but are denied the right to recover any part of their contributory value. Grossly unequal treatment of those persons within the protected class will inevitably and routinely occur. Each of the explanations advanced in *Austex* for this disparity is unsatisfactory.

The court first contemplated its own hypothetical landowner who owned property abutting the roadway which was not taken in part for the project. This landowner might well suffer losses in value similar to those incurred by Austex but, under Texas inverse condemnation precedent, would be allowed no recovery.

The court contrasted this landowner's plight with the full market indemnification awarded Austex for a small taking and perceived an intolerable anomaly. To remedy this conflict, the court decided that both landowners should be denied the right to recover for their damages. *Austex, supra.*, 867 S.W.2d at 775.

This result is not anomalous at all. It reflects the actions of the market and meets the reasonable investment-backed expectations of all Texas landowners. When they acquire their property, knowledgeable purchasers expect very limited control over the use to be made of abutting properties. So long as the adjacent owner does not maintain a nuisance or make an illegal use he owes no compensation to his neighbors. If the same landowner contemplates development which requires him to buy a part of the adjacent property, he must reasonably expect to also pay for any adverse impacts on the value of his neighbor's remaining land. This is especially true if the property is commercial and

the part acquired is the frontage which insures ready visibility and access from the roadway.

Condemnation law functions under identical rules. Where no taking has occurred, compensation is not required even though the property may have been reduced in value. *Kirby Forest Ind., Inc. v. United States*, 467 U.S. 1 (1984). On the other hand, where the owner's property is physically appropriated he is entitled to the full protection of the Fifth Amendment, even if the taking seems so small as to be insignificant. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court has recently acknowledged this very disparity in the highway widening context, noting that "takings law is full of these 'all or nothing' situations." *Lucas v. So. Carolina Coastal Council*, 112 S.Ct. 2886, 2895 (1992), footnote 8.

Reliance on the Ninth Circuit's modifications to *Campbell* is equally inappropriate. The Texas court disallowed recovery because the strip acquired from

Austex was small and did not constitute a "substantial" part of the real property devoted to the entire project. *Austex, supra*, 867 S.W.2d at 779. The "substantiality" test was not established by the opinion of This Court in *Campbell* but was purportedly added later by the Ninth Circuit in *15.65 Acres of Land, supra*. The Court should avail itself of the opportunity to disapprove use of this test, even in those few instances where *Campbell* is properly applied.

The question of substantiality turns solely on the size of the project the condemnor chooses to build and the amount of the condemnee's property which it chooses to take. These factors are completely irrelevant to the correct constitutional inquiry: "what has the owner lost, not what has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). This test also seems to run afoul of the direct holding of This Court in *Loretto*.

Finally, the Texas supreme court distinguished or ignored its earlier precedents and defined the disputed remainder damages as "community" in nature and generally unrecoverable under TEX. PROP. CODE ANN. § 21.042(d). (Appendix A-3). Recovery is only allowed where the damages differ in kind and not just in degree from those imposed on other property owners along the roadway. *Austex, supra*, 867 S.W.2d at 781. Under this rule, the State's duty to compensate under the Fifth Amendment is reduced so long as a large number of properties are simultaneously taken in similar fashion.

Though arbitrarily labeled "community," these losses are not in any sense borne by the general population; they are peculiar to the Petitioners' ownership of their land. On every day since his property was severed, each Petitioner has owned a less useful and less profitable asset. These losses will finally be realized by the Petitioners alone when their properties are sold for a fraction of the *fair market value* eventually

established by condemnation trial. In fact, both Austex and Centennial Mortgage had entered contracts to sell their remaining properties by the time of trial. In both cases, the agreed price was more than $1,000,000 less than the State's value estimate for the remainder as calculated under this contrived definition of *fair market value*. Neither the State nor the supreme court of Texas has suggested any mechanism by which any part of these losses will be shared by any other member of the community.

The new definition fails equal protection analysis as well. The Austex frontage might well have been required for a much smaller public project where no additional takings were necessary. Any loss of exposure and accessibility would then be unique to Austex and fully compensated. The meanings of *Fair Market Value* and *Just Compensation* thus vary, depending on the scope of the public project and the amount of land it requires. These considerations are manifestly irrelevant to the

extent and nature of the landowner's damages and do nothing to explain, let alone justify unequal treatment within the protected class.

The Fifth Amendment makes no distinction between partial and total takings. It commands just compensation for each. The size of the public project and the extent to which any one owner's land may be acquired by the State bears no rational relationship to the sole legal objective: that of making the injured party whole. The Court should not give even tacit approval to this unwarranted and illogical expansion of the narrow rule announced in *Campbell.* State and local government should be held to its obligation to provide equal and just compensation for all persons entitled to protection under the Fifth Amendment.

CONCLUSION

The *market value test* has evolved and withstood the rigors of time because it works. It makes the injured party whole and protects both sides of the controversy

from the prejudicial effects of duress. The holdings of the Texas supreme court distort and erode the test to such an extent that it no longer satisfies the Constitutional requirement and is practically impossible to implement.

The Court should grant this Petition and allow the landowners to more fully develop and brief their position. Should the Court fail to correct this gross departure from the requirements of the Just Compensation Clause, local government will be emboldened to further eviscerate the *market value test* and render it useless to insure just compensation and equal treatment under the law.

Respectfully submitted,

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APPENDIX I

Property Owner/ Use	Taking (sqft)	State Testimony	Verdict/ Judgment
Austex/ Shopping Center	1,275	$18,932	$218,932
Munday/ Car Dealership	72,072	$3,133,857	$8,469,870
Edwards/ Feed Store	1,096	$23,194	$126,464
Allen/ Vacant Retail	1,240	$51,760	$133,984
Centennial/ Shopping Center	10,433	$203,897	$1,531,522

§ 21.041 **Evidence**

As the basis for assessing actual damages to a property owner from a condemnation, the special commissioners shall admit evidence on:

(1) the value of the property being condemned;

(2) the injury to the property owner;

(3) the benefit to the property owner's remaining property; and

(4) the use of the property for the purpose of the condemnation.

§ 21.042 **Assessment of Damages**

(a) The special commissioners shall assess damages in a condemnation proceeding according to the evidence presented at the hearing.

(b) If an entire tract or parcel of real property is condemned, the damage to the property owner is the local market value of the property at the time of the special commissioners' hearing.

(c) If a portion of a tract or parcel of real property is condemned, the special commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including the effect of the condemnation on the value of the property owner's remaining property.

(d) In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, but they may not consider an injury or benefit that the property owner experiences in common with the general community.

(e) [This section was declared unconstitutional and is not reproduced.]

THE SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 2, 1994

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RE: Case No. D-1509

Style: STATE OF TEXAS and CITY OF AUSTIN v. AUSTEX, LTD. ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS, CLERK

Peggy Littlefield

Peggy Littlefield,
Chief Deputy Clerk

867 S.W.2d 769 (Tex. 1993)

STATE of Texas and City
of Austin, Petitioners,
v.
Robert M. SCHMIDT and Richard A.
Massman, Co-Trustees of the Leon A.
Schmidt Children's Trust No. 1 et al.,
Respondents.

STATE of Texas and City
of Austin, Petitioners,
v.
AUSTEX, LTD. et al., Respondents.

Nos. D-1006, D-1509

Supreme Court of Texas.

Oct. 27, 1993.

Rehearing Overruled Feb. 2, 1994

OPINION

The principal issue in these two consolidated cases is whether a landowner, part of whose property is taken by power of eminent domain to convert a roadway into a controlled access highway, is entitled to compensation for a diminution in the value of the remainder due to a diversion of traffic, an increased circuity of travel to the property, a lessened visibility to passersby, and the inconvenience of construction activities. The lower courts allowed the compensation in both these cases. *State v. Schmidt*, 805 S.W.2d 25 (Tex. App.--Austin 1991); *State v. Austex, Ltd.*, 862 S.W.2d 1 (Tex. App.--Austin 1991). We disagree and accordingly reverse the judgments of the court of appeals and render judgment against the landowners.

I

These cases involve two adjoining tracts of land abutting U.S. Highway 183 in the City of Austin some seven miles north of downtown. One of the tracts is

owned by the Leon A. Schmidt Children's Trust No. 1, and hence we refer to it as the Schmidt tract. The other is owned by Austex, Ltd., a Nevada corporation, and Cavendish Holdings, Ltd., a Maryland corporation, and we refer to it as the Austex tract. The immediate area is depicted in this schematic:

AUSTEX
TRACT
SCHMIDT
TRACT
HIGHWAY 183

The rectangular Schmidt tract extends some 75 feet along the highway and 200 feet back. Toward the rear of the property is a building for two tenants-at the time of trial, a personal computer software outlet and a film processing business. The area between the building and the highway is used for parking.

The 3.76-acre Austex tract surrounds the Schmidt tract on three sides and thus fronts the highway on both sides of the Schmidt tract, approximately 40 feet on one side and 150 feet on the other. There are two buildings on the Austex tract, one to the rear of the property, and the other along one side across from the building on the Schmidt tract. These buildings, known as the Town North Shopping Center, were occupied at the time of trial by a post office substation, a night club, and several retail businesses, including a bookstore, restaurant, beauty salon, video store, and office supply store. The narrower

strip on the one side of the Schmidt tract is vacant. On the other side, the area nearest the highway is used for parking.

Highway 183 - or Research Boulevard as it is known at this location - is a major traffic artery, and much of the land along both sides of it, like the Schmidt and Austex tracts, is used for free standing retail outlets and other commercial developments. Beyond and sometimes among these developments are residential areas. In the vicinity of the Schmidt and Austex tracts, the highway has six lanes, three for traffic in each direction separated by a grassy median, all on the same grade as intersecting streets and the surrounding property. Buildings on adjacent property, including those on the Schmidt and Austex tracts, are clearly visible from the highway. The Schmidt and Austex tracts are connected to the highway by driveways allowing traffic in the lane nearest the tracts direct access. Traffic in the opposite direction must cross the highway at an

intersection and gain access by the side street, Fairfield Drive, or by returning back the opposite direction and using a driveway.

The State of Texas and the City of Austin (both of which we refer too as the State) have decided to convert Highway 183 into a controlled access highway. This change entails eliminating grade crossings, which will be accomplished in the area of the Schmidt and Austex tracts by elevating the main traffic lanes some 37 feet. As a result, the buildings below will be less visible to motorists on the elevated highway. All six lanes at grade will remain in service, and access to the tracts from those lanes will remain unchanged. Most of the traffic, however, will be diverted to the elevated main highway,

from which motorists must exit by a ramp to the lower roadway to gain access to the tracts. This route of access will be somewhat more circuitous and less convenient

than at present. Construction is to be done in phases extending over a total of five years.

The alterations to Highway 183 require expansion of the existing right-of-way a little less than seven feet into the Schmidt and Austex tracts (shown by the dotted line in the schematic above) to meet minimum right-of-way requirements for federal funding of the highway construction. Accordingly, the State instituted these condemnation proceedings to take a small strip of land - about 503 square feet from the Schmidt property and about 1,275 square feet from the Austex property - along the highway frontage. The special commissioners awarded the owners of the two tracts $7,559 and $105,000, respectively, and the owners appealed.

In the case of the Schmidt tract, the owner stipulated that the value of the strip taken was $7,559, but claimed additional compensation for the decreased market value of the remainder of the tract due to two factors: the impairment of its visibility from the main

highway, and the inconvenience and disruption caused by construction activities extending over a period of several years. The owners of the Austex tract also claimed compensation for a reduction in the market value of the remainder of their property due the same two factors plus two others: the diversion of traffic from the highway at grade level, and the resulting circuitry of travel required to gain access to the tract. Each case was tried to a jury, who found severance damages - the diminution in the market value of the remainder after the condemnation - of $74,880 for the Schmidt tract and $200,000 for the Austex tract. The jury in the Austex case also found the value of the strip taken to be $18,932. Each trial court rendered judgment on the verdict. The State appealed only the award of severance damages, and not the awards for the land actually taken. The court of appeals affirmed both judgments.

II

Article I, section 17 of the Texas Constitution provides in pertinent part: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . ." Very early in the State's history, we held that when part of a person's property is taken, this provision requires adequate compensation both for the part taken and any severance damages to the remainder. *Buffalo B., B. & Colo. R.R. v. Ferris*, 26 Tex. 588, 603 (1863) (applying identical language from Tex. Const. of 1861, art. I, § 14). Consistently, section 21.042(c) of the Texas Property Code now provides:

> If a portion of a tract or parcel of real property is condemned, the special commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including the effect of the condemnation on the value of the property owner's remaining property.

The measure for determining severance damages was established in *State v. Carpenter*, 89 S.W.2d 194, 197-198, 200 (Tex. 1936):

> We are of the opinion that the proper rule for ascertaining the measure of damage to the remainder of a tract of land where a part only has been taken for public use is directly analogous to the rule which is applicable when there has been a permanent injury to land by reason of the construction of an improvement, or the construction of an improvement by a private agency exercising the right of eminent domain. By this rule the damages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the appropriation, taking into consideration the nature of the improvement, and the use to which the land taken is to be put. Of course, this rule relates to the ascertainment of the damages to the property itself. There may possibly be items of special damages which may not be accurately reflected in the difference between the market value before and the market value after, but everything which affects

> the market value of the land itself, having due regard for past and probable future injuries, may be accurately reflected by ascertaining the difference in value, when all the legitimate testimony is properly submitted to the jury for consideration.

* * *

> Generally, it may be said that it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the present market value. Evidence should be excluded relating to remote, speculative, and a conjectural uses, as well as injuries, which are not reflected in the present market value of the property.

The rule in the *Carpenter* case, which is as settled as any in our jurisprudence can be, is the basis for the position taken by Schmidt and Austex.

Their argument runs as follows. *Carpenter* requires that all factors affecting the fair market value of the remainder be considered in determining severance damages. It cannot be denied that traffic patterns, convenience of access, visibility, and the disruption of construction activities over an extended period of time can affect the market value of property. Therefore, these factors must be taken into consideration in ascertaining severance damages. When this is done in the present cases, the State does not deny that the market value of

the Schmidt and Austex tracts has diminished, nor does it challenge the amount of that diminution as found by the jury in each case. Thus, the award of severance damages was proper.

The State has three responses, and we examine each in turn.

III

The State argues that the four elements of injury claimed by Schmidt and Austex should not be considered in assessing severance damages because they are not the kind of injuries for which compensation is due under the Constitution and the statutory provision. As authority for this assertion, the State cites several inverse condemnation cases - actions brought by landowners complaining that their property has been damaged or taken for public use without payment of adequate compensation.

The first such case is *State Highway Comm'n v. Humphreys*, 58 S.W.2d 144 (Tex. Civ. App.--San Antonio

1933, writ ref'd), which arose from the State's proposal to re-route a highway around the town of Comstock to allow motorists to avoid the downtown area, leaving the old road through town without change. Business owners along the road in town obtained an injunction against relocating the main highway, contending that the diversion of traffic caused by rerouting the main highway amounted to a taking or injuring of their property without due process. In an opinion approved by this Court, the appellate court reversed, explaining:

> "The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgment of the public authorities." [Citing *Heller v. Atchison, T. & S. F. Ry.*, 28 Kan. 625 (1882).] If the public authorities could never change a street or highway without paying all persons along such thoroughfares for their loss of business, the cost would be prohibitive. The highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business along its way. They build up their business knowing that new roads may be built that will largely take away the traveling public. This is a risk they must necessarily assume.

Id. at 145.

In *DuPuy v. City of Waco*, 396 S.W.2d 103 (Tex. 1965), the trial court awarded a landowner damages for a diminution in the value of his property resulting from the construction of a viaduct and changes in the street in front of his property. We agreed that the landowner was due compensation, but only because he had been deprived of reasonable access to his property. We explained that allowance of damages for a deprivation of reasonable access did not conflict with *Humphreys*, which stands

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> principally for the propositions that an abutting property owner does not have a vested interest in the traffic that passes in front of his property; that he cannot recover for loss of trade resulting from a highway relocation; and that he is not entitled to damages because of the construction of controlled access highways in such manner as to deny direct access to the new major highway.

Id. at 109. In a companion case to *DuPuy*, brought by a neighboring landowner, we held that the landowner had not been deprived of reasonable access and therefore was

not entitled to any compensation at all. *Archenhold Auto. Supply Co. v. City of Waco*, 396 S.W.2d 111 (Tex. 1965).

In *City of Houston v. Fox*, 412 S.W.2d 745 (Tex. Civ. App.--Houston [1st Dist.] 1967), the court of civil appeals held that the degree of impairment of access to property must be considered in light of its highest and best use. So, the court reasoned, a diversion of traffic which resulted in substantially less convenient access to a retail business can be a compensable injury, even if it would not be were the property used for some other purpose. Based on this analysis, the court affirmed an award of damages to the landowner. We rejected this reasoning on the grounds that it conflicted with *Archenhold* and *DuPuy*. 419 S.W.2d 819 (Tex. 1967) (per curiam). On remand, the appeals court again affirmed an award of damages to the landowner. We again reversed the appeals court and rendered judgment that the landowner recover nothing. *City of Houston v. Fox*, 444 S.W.2d 591 (Tex. 1969). The same day we issued our

second opinion in *Fox*, we held in *City of Waco v. Texland Corp.*, 446 S.W.2d 1, 2 (Tex. 1969), "that property has been damaged for a public use within the meaning of the Constitution when access is materially and substantially impaired even though there has not been a deprivation of all reasonable access. . . ." Applying this new test in *Fox*, we held that access to his property had not been materially and substantially impaired. We explained: "Cities may make streets narrower without violating the rights of the abutting landowner. . .unless the street is so narrowed or altered as to materially and substantially impair the landowner's access." 444 S.W.2d at 592-593 (citation omitted). And we added: "[A]ny injury due to diversion of traffic or circuity of travel with reference to the [landowner's] property brought about by the changes in [the abutting] streets is noncompensable." *Id.* at 593.

In *City of Beaumont v. Marks*, 443 S.W.2d 253 (Tex. 1969), we again allowed damages for a material and substantial impairment of access to a landowner's

property due to a change in grade of nearby railroad tracks. We also held, however, that it was reversible error to admit evidence of a diminution in the value of the property due to a diversion of traffic. Citing *Humphreys*, we reaffirmed: "Diversion of traffic resulting in the necessity of using circuitous routes is not compensable." *Id.* at 257. We repeated this statement in *City of San Antonio v. Olivares*, 505 S.W.2d 526 (Tex. 1974), where we held that hotel owners were not entitled to damages for the partial closure of a dedicated alley behind their property.

Thus, we have often disallowed, and never allowed, recovery in an inverse condemnation case for damages resulting from a diversion of traffic or a circuity of travel. While we have never addressed the issue of whether a landowner has a right to recover for an impairment in the visibility of his premises to passing traffic, there is no reason why recovery for this type of injury should be more available than for a diversion of traffic or circuity of

travel. Just as a landowner has no vested interest in the volume or route of passersby, he has no right to insist that his premises be visible to them. *See* JULIUS L. SACKMAN & PATRICK J. ROHAN, NICHOLS, THE LAW OF EMINENT DOMAIN (3d ed. rev. 1992) § 14.13[2], at 14-310 ("It has been held that an impairment of this right [to be seen] is not a legally cognizable element of damage.").

In the one case in which we have considered a claim for damages for the inconvenience of highway construction, we have recognized that recovery may be allowed in some limited situations. In *City of Austin v. Avenue Corp.*, 704 S.W.2d 11 (Tex. 1986), a restaurant owner sued for lost profits caused by reconstruction of the street and sidewalk

in front of his premises over a period of nine months. Although the trial court found that there had been a material and substantial interference with access to the premises, we held that damages could not be recovered

unless there was either a total temporary or partial permanent restriction of access, or a partial temporary restriction of access due to illegal or negligent activity. *Id.* at 13. Schmidt and Austex do not claim that their injuries fall within any of these three categories. Rather, they contend that construction activities in front of their property, while not precluding access, will make it so inconvenient that businesses on the property will be damaged. We spoke to this contention in *Avenue Corp.*:

> The inconvenience and damage which a property owner suffers from these temporary obstructions are incident to city life and must be endured. The law gives him no right to relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made.

Id. at 12 (quoting *L.M.S., Inc. v. Blackwell,* 149 Tex. 348, 233 S.W.2d 286, 289 (Tex. 1950), quoting in turn *Farrell v. Rose,* 253 N.Y. 73, 170 N.E. 498 (1930)).

Under the general rules of the cases we have cited, none of the four elements of injury asserted by Schmidt and Austex amounts to a taking or damaging of property

that is compensable in an inverse condemnation case. Schmidt and Austex acknowledge this and concede that they would not be entitled to recover in an inverse condemnation action for any of the injuries they have alleged. They argue, however, that the rule should be different when those injuries are accompanied by a physical taking of property, as in condemnation cases. In all such cases, they say, the threshold requirement for recovery, that a taking occur, is satisfied by the fact that the condemnor has filed suit, and the only remaining issues are the value of the property taken and the injury, measured in loss of value, to the remainder. Under *Carpenter*, they insist, every factor contributing to the claimed loss must be considered, including the four asserted here.

Allowing recovery for an injury in condemnation cases when recovery is not allowed for the same injury in inverse condemnation cases creates an anomaly illustrated by the following hypothetical. Suppose in the present

cases that the change in Highway 183 necessitated taking a small strip from the Austex tract only, without taking any part of the Schmidt tract. Schmidt would still contend that the value of his property had been injured to the same degree as the value of the remainder of Austex' property, since the taking of part of Austex' property did not itself contribute to any diminution in the remainder. Yet according to Schmidt and Austex' argument, only Austex could recover damages for his injury. If no part of Schmidt's property were taken, Schmidt's only recourse would be an action for inverse condemnation in which, as Schmidt and Austex concede, Schmidt could not prevail. In these circumstances, adjacent landowners would suffer identical injury, yet only one could recover, the one a part of whose property was physically taken.

Schmidt and Austex argue that this is not an anomaly but a reflection of the marketplace. They give the following illustration. A landowner may use his

property in any legal way, even if it causes the value of his neighbor's property to be diminished, and the neighbor is without recourse. But if the landowner must acquire part of his neighbor's property before he can use his own in a particular way, he can expect his neighbor to charge a price for that part which will compensate him both for the part and for the diminution in the value of the remainder caused by his use of his property. This, Schmidt and Austex argue, is the situation in these cases. If the State did not need part of their property to complete the Highway 183 project, they would have no claim for damages. But the State did not need part of their property to complete the Highway 183 project, they would have no claim for damages. But the State does need part of their property, and because it does, it must pay both for that part and for the injury to the remainder caused by the use for which the part taken is essential.

The flaw in this argument is that it does not assume a willing buyer; rather, it assumes a buyer

constrained to buy or abandon his plans for the use of his other property.

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This buyer must decide whether to pay his neighbor more than the value of the small piece of property actually acquired, or forego his plans. The seller in this situation can certainly *try* to charge a price that will cover the value of the parcel sold as well as the loss in the value of the remainder occasioned by the buyer's use of his own property; indeed, the seller might try to charge even more, hoping that the buyer's interest in his plans will motivate him to pay a premium. The fact that a seller in the marketplace is free to take advantage of a buyer's circumstances if he can does not justify the same conduct when the buyer is the State.

The argument that a different rule applies in condemnation cases and inverse condemnation cases does not find support in our decisions. To the contrary, our decisions in condemnation cases have uniformly refused

to allow severance damages based upon diversion of traffic and circuity of travel. Thus, in *Pennysavers Oil Co. v. State*, 334 S.W.2d 546 (Tex. Civ. App.--San Antonio 1960, writ ref'd), the State, as in the cases before us, condemned a small strip of property in order to convert an abutting two-lane road into a controlled access highway. The State and landowner agreed as to the value of the part taken, but disagreed as to whether there was any loss in the value of the remainder, just as the parties in the present cases have done. The trial court rendered judgment on a verdict that there was no loss to the remainder. This Court, in refusing writ, concluded that an owner of property abutting a highway has no right to unimpaired access to traffic, although he does have a right of some access. If access is completely denied, the court explained, damages must be paid, and the measure is the diminution in the value of the remainder. But if the right is only impaired, there is no entitlement to compensation. The opinion explained that

> no abutting property owner has a vested interest in the traffic that passes in front of his property, and if this traffic is diverted by the State building a road at another place, and the traveling public prefer to travel the new road and abandon the old road, the State cannot be held liable for any loss of trade suffered by an abutting landowner on the old abandoned road.

Id. at 549. As authority the opinion cited, among other cases, *Humphreys*, an inverse condemnation case.

In *State v. Baker Bros. Nursery*, 366 S.W.2d 212 (Tex. 1963), the State again sought condemnation of part of a parcel of property in order to convert a road into a controlled access highway. The trial court granted the State's pretrial motion in limine to suppress any evidence regarding changes in traffic flow on the value of the remainder. The landowner complained of this ruling on appeal. The court of civil appeals observed that the trial court's exclusion of evidence may have been error, but it was not prejudicial. 357 S.W.2d 163, 167 (Tex. Civ. App.--Fort Worth 1962). This Court disagreed:

> The Court of Civil Appeals further held that it was error for the trial court to sustain a motion made by the State in advance of trial,

> which not only sought to suppress and reference by counsel to, or any evidence of, the direction of the flow of travel upon the proposed limited access highway resulting from the condemnation, but further to likewise suppress reference or evidence of any circuity of travel occasioned by such highway. This was not a case where all access to the new highway was denied, but a case where each remaining tract had access to the highway through the frontage roads alongside and parallel to the highway. Under these circumstances, there was no error by the trial court in sustaining the State's motion to suppress.

366 S.W.2d at 214. In reaching this conclusion the Court relied upon *Pennysavers.*

Much more recently, in *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863 (Tex. 1988), the trial court granted the State's motion in limine to exclude evidence that the remainder of property on which the landowner operated a truck stop had been damaged by increased circuity of travel due to construction of a highway. The court of appeals reversed. This Court affirmed the trial court. In a unanimous opinion, the Court stated:

> It is well settled that damages to a condemnee's business which result merely

> from traffic being required to travel a more circuitous route to reach a condemnee's property are not compensable. [Citing *Olivares*, *Fox*, *Texland*, and *Marks*.] The question of whether there has been a material and substantial impairment of access or whether there exists merely the issue of circuity of travel is a question of law, not of fact. It is incumbent upon the trial court to make this determination prior to trial and to control the admission of evidence accordingly. Thus, the introduction of evidence on damages due to inconvenience suffered by a property owner as a result of circuity of travel is improper as a matter of law since it is a non-compensable matter. [Citing *Olivares*, *Texland*, *Marks*, and *DuPuy*.] Accordingly, the court of appeals erred in reversing the trial court on the basis of exclusion of evidence on this issue.

Id. at 865. All of the cases on which we relied in *Wood Oil* were inverse condemnation cases.

Thus, we have refused to allow recovery for loss of value due to diversion of traffic and circuity of travel in both condemnation cases and inverse condemnation cases. We have not considered whether severance damages should be allowed because of impaired visibility of property or disruption of use due to construction activities, but there is no reason why these two elements of injury should be treated differently than the others.

The decisions of the courts of appeals involving these issues have not been entirely consistent. *Compare Olson v. Harris County*, 807 S.W.2d 594, 595 (Tex. App.--Houston [1st Dist.] 1990, writ denied) (circuity of travel not compensable); *Holbrook v. State*, 355 S.W.2d 235 (Tex. Civ. App.--Eastland 1962, writ ref'd n.r.e.) (severance damages denied for diversion of traffic, circuity of travel, and construction inconvenience); *with State v. Buck*, 489 S.W.2d 642 (Tex. Civ. App.--Corpus Christi 1972, writ ref'd n.r.e.) (severance damages allowed for diversion of traffic and circuity of travel); *Milam County v. Akers*, 181 S.W.2d 719 (Tex. Civ. App.--Austin 1944, writ ref'd w.o.m.) (severance damages allowed for diversion of traffic). To the extent *Akers* and *Buck* conflict with the principles in *Pennysavers*, *Baker Bros.*, and *Wood Oil*, they are disapproved.

Schmidt and Austex' argument that different rules should apply in condemnation cases and inverse condemnation cases is not supported by the decisions of

this Court. While were are not prepared to insist that the two types of cases always be governed by identical rules, with respect to the elements of injury Schmidt and Austex claim, the general rule inverse condemnation cases and condemnation cases has been the same.

Schmidt and Austex nevertheless contend that even if severance damages based upon injuries like those claimed here have been denied in condemnation cases, those cases conflict with the rule in *Carpenter* that all relevant factors must be considered in determining severance damages. While the rule in *Carpenter* may not have been applied in the cases we have cited, Schmidt and Austex argue that it should have been, and that it should be applied in the present cases. The State responds that the cases cited above establish in essence an exception to *Carpenter* for the types of damages claimed in those cases and the present ones.

Despite the broad language in some of the opinions we have cited, and the fact that we have never

allowed recovery for severance damages like those claimed here, we are reluctant to hold that such damages can never be recovered. There are other reasons wholly consistent with *Carpenter* why damages should not be allowed for the types of injury Schmidt and Austex claim. We therefore turn to the State's other responses to Schmidt and Austex' *Carpenter* argument.

IV

The State contends that Schmidt and Austex are not entitled to severance damages because the damages they claim did not result from the taking of their property, but from the State's new use of its existing right-of-way and of property taken from other landowners to widen it. We agree.

Section 21.042(c) requires consideration of "the effect of the condemnation on the value of the property owner's remaining property." The effect of the State's condemnation on

each tract in the present cases - that is, the taking of a small strip of property -- is different from the effect of the State's change in Highway 183. The statue allows recovery only for the former.

We recognized this distinction in *State v. Clark*, 161 Tex. 10, 336 S.W.2d 612 (Tex. 1960). There, the State decided to use property dedicated for park purposes as part of the expanded right-of-way for the elevated approach to a high level bridge over a ship channel. The owner of the property abutting the park sued for inverse condemnation. We acknowledged that a landowner has an interest in abutting property dedicated as a park, and that damages could be recovered for the injury to that interest. However, we limited recovery to the diminution in value of the landowner's property due to the State's change in the use of the park, and denied recovery for a diversion of traffic or other consequences of the construction of the project generally. We explained that the landowner was

> only entitled to recover for the diminishment in value of his property caused by the diversion of the parkway to that portion of the elevated structure resting upon the parkway. His damages therefore must be assessed as though the elevated structure already existed . . . and the State acquired this park property only for the purpose of widening the elevated roadway. It would be wholly inequitable to allow the [landowner] damages based on the difference in value in his property before and after the completion of the entire project when he would have suffered no recoverable damage if the construction had not been widened to include the parkway in which he asserts an interest.

Id. 336 S.W.2d at 618.

The principle underlying our decision in *Clark* was established by the United States Supreme Court in *Campbell v. United States,* 266 U.S. 368, 372, 45 S.Ct. 115, 117, 69 L.Ed. 328 (1924):

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking.

Although the *Campbell* decision was based on the Fifth Amendment, the rule it announced has been followed in

most cases in other jurisdictions where the same issue was raised. *See* Annotation, *Compensation for Diminution in Value of the Remainder of Property Resulting from Taking or Use of Adjoining Land of Others for the Same Undertaking*, 59 A.L.R.3d 488 (1974). Although we have never referred specifically to the rule, we applied it in essence in *Clark*.

The Ninth Circuit has held that the *Campbell* rule should be applied unless:

> (1) the land taken from the condemnee landowner was indispensable to the . . .project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the . . . project.

United States v. 15.65 Acres of Land, 689 F.2d 1329, 1332 (9th Cir. 1982), *cert. denied*, 460 U.S. 1041, 103 S.Ct. 1435, 75 L.Ed. 793 (1983); *accord, United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961). This exception is based upon the analysis in *Campbell* and

employed to allow landowners to recover in the circumstances described by the exception. We agree that this exception is a necessary qualification to the *Campbell* rule. In the present cases it is clear that the diminution in value claimed by Schmidt and Austex in their remaining property is due entirely to the State's modifications to Highway 183 and not to the use of the strip taken from each tract. The diversion of the traffic, circuity of travel, and impaired visibility are all attributable to the conversion of Highway 183 to a controlled access highway. This conversion is to be accomplished, not on the small strips taken from the Schmidt and Austex tracts, but by changes in the entire roadway. Even the claim of inconvenience

due to construction is based upon activities up and down the roadway and not simply those conducted on the strips taken. These cases do not fit within the exception described in *15.65 Acres:* although the strips taken are

indispensable to the project, they do not constitute a substantial part of the property devoted to the project, and the damages resulting to the remaining tracts are not inseparable from those caused by the taking. Accordingly, we conclude that Schmidt and Austex are not entitled to recover the severance damages claimed.

V

The State also contends that the severance damages claimed by Schmidt and Austex are not allowed by section 21.042(d), which states:

> In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, but they may not consider an injury or benefit that the property owner experiences in common with the general community.

We have not often had occasion to consider what constitutes community damages. We first acknowledged the general principle against awarding community damages in *Gulf, Colorado & Santa Fe Ry. v. Fuller,* 63

Tex. 467 (1885). In that case we affirmed an award to a landowner against the railroad for the reduction in the value of his property due to the operation of trains in the abutting street. We explained:

> If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto; that is, if an injury, not suffered by that particular property or right only in common with other property or rights in the same community or section, by reason of the general fact that the public work exists, be inflicted, then such property may be said to be damaged.
>
> Every government has the power to construct or to cause to be constructed public works, and insofar as such construction works an injury to the public, it can give no one a right to a private action.

Id. at 470.

The principle is far easier to articulate than to define. In *Gainesville, H. & W. R.R. v. Hall*, 78 Tex. 169, 14 S.W. 259 (Tex. 1890), we held that a homeowner's diminution in the value of his property caused by vibration, noise, smoke, noxious vapors and cinders incident to the operation of trains on tracks about 37'

away was not community damages as a matter of law but rather, a question for the jury. In *Texarkana & N.W. R.R. v. Goldberg*, 68 Tex. 685, 5 S.W. 824 (Tex. 1887), we held that a homeowner had not suffered only community damages by construction of railroad tracks in the street abutting his property such that there was room for only one car to pass at a time, and sparks from trains posed a danger to his buildings. There we wrote:

> The fact that the injury was common to all other property holders on the street would not bar the plaintiff's right of recovery. The plaintiff sues for a special damage to his own property by reason of defendant's having impaired the use of the street on which it fronts. It does not affect his right to recovery that his neighbors, the owners of property fronting on the same street, have been injured in the same manner. This is a loss peculiar to plaintiff's property, and not one he suffers in common with the community generally where the property is situated.

Id. 5 at S.W. at 826. Following *Goldberg*, we held in *Powell v. Houston & T. C. R.R.*, 104 Tex. 219, 135 S.W. 1153, 1155-1156 (Tex. 1911), that a landowner suffered more than community damages to his business as a result of the diversion of traffic due to an obstruction on a

nearby street to allow for construction of a railroad, even though the street in front of the property remained open, and access by that means was unobstructed.

However, we took a broader view of community damages in the context of highway construction in *Lee v. City of Stratford,* 125 Tex. 179, 81 S.W.2d 1003 (Com.App. 1935).

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Lee claimed that the City's abandonment of streets to allow for construction of railroad tracks near his property made his route to school, the post office, and the main business part of the City more circuitous and difficult. The road abutting his property was not closed, and he retained direct access to it from his property. We affirmed an instructed verdict for the City, stating:

> "if the street directly in front of one's property is not vacated but the portion vacated is in another block, so that he may use an intersecting cross street, although perhaps it is not quite so short a way nor as convenient, it is almost universally held that he does not suffer such a special injury as entitles him to damages. And this is so notwithstanding the new route is less convenient or

> the diversion of travel depreciates the value of his property. The fact that the lot owner may be inconvenienced or that he may have to go a more roundabout way to reach certain points, it is generally held, does not bring him an injury different in kind from the general public, but in degree only. 'If means of ingress and egress are not cut off or lessened in the block of the abutting owner, but only rendered less convenient because of being less direct to other points in the city, and made so by the vacation of the street in another block, such consequence is damnum absque injuria.'"

Id. at 1004 - 1005 (quoting 4 EUGENE MCQUILLAN, MUNICIPAL CORPORATIONS § 1527, at 279). *Lee* did not cite *Powell* or *Goldberg*.

Speaking more generally in *Ft. Worth Improv. Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S.W. 164 (Tex. 1913), we wrote:

> In the construction of legally authorized public works, it is inevitable that benefits will accrue to the property of some persons and injury will result to that of others. If the injury that thus results from the improvement be only of such nature as is suffered from that cause in common with other property in the same community or section, the damages thus accruing are deemed merely consequential, and no right of action exists. In such cases, it is not considered that the property is "damaged" within the contemplation of the constitutional provision, and the right to

> compensation is denied. If, however, a public work is constructed which inflicts an injury peculiar to certain property not suffered in common with other property in the community or section, then such property is "damaged" within the meaning of the Constitution, and the law will not permit the infliction of such injury without the allowance of just compensation. . . .
>
> The question in all such cases is resolved by determining whether the injury is peculiar to the property in question, or is only such as is suffered from the same cause in common with other property in the same section or community; that is, whether the property is "damaged" in the true sense of the constitutional provision.

Id. 158 S.W. at 168 - 169.

Section 21.042(d) prohibits consideration of community benefit as well as community injury. We addressed this related concept in *City of Dallas v. Priolo*, 150 Tex. 423, 242 S.W.2d 176 (Tex. 1951), in which a landowner claimed injury to his remaining property after the City took a small strip to widen an abutting highway. In response to the City's argument that the change in the highway actually benefited his property, the landowner contended that any benefit was only that shared by the entire community. We concluded that it could not be

held as a matter of law that the straightening of a jog in the highway in front of the landowner's property did not confer a special benefit which was not equally shared by the community.

Community benefit is also relevant when a city assesses landowners for improvements in streets abutting their property. In a case involving a paving assessment, *Haynes v. City of Abilene,* 659 S.W.2d 638 (Tex. 1983), we reviewed the concept of community injury in eminent domain cases, including *Goldberg* and *Priolo,* and concluded that the mere fact that injury was common to everyone on a street would not bar recovery in such cases. Extracting from these cases, we concluded that "'special benefit' connotes an enhancement more localized than a general improvement in community welfare, but not necessarily unique to a given piece of property. A special benefit is one going beyond the general benefit supposed to diffuse itself from the improvement through the municipality."

Id. at 641 - 642.

In each of these cases, the analysis of whether an injury or benefit was common to the community involved consideration of the location of the landowner's property, the condemnor's project, and the effects of the latter. However, the concept of community injury and benefit is not primarily geographical. It is always true that the injury or benefit from a public project increases with proximity. While injury to several landowners on the same street is not community injury simply because they all suffer alike, it is also not special injury simply because others farther away do not suffer at all. Whether an injury is community cannot be decided simply be setting the size of the relevant area. "Community" in this context means not only where, but, more importantly, what kind. It is the nature of the injury rather than its location that is critical in determining whether it is community.

The diversion of traffic, inconvenience of access, impaired visibility of ground-level buildings, and

disruption of construction activities of which Schmidt and Austex complain are, by their nature, a consequence of the change in Highway 183 shared by the entire area through which it runs. While on or more of these elements of injury could affect the Schmidt and Austex tracts in some special, unique way, different from the effect on the surrounding area, there is no claim here that they do. Schmidt and Austex may be impacted more severely than some others in the area, but the difference is one of degree and not of kind. Thus, we agree with the State that the severance damages claimed are not allowed by section 21.042(c).

VI

Schmidt and Austex argue that the difficult process of determining the value of property is made more hypothetical and uncertain whenever relevant factors are excluded from consideration. As hard as it is to determine the value of property as it exists, it is harder still to determine its value as it might be. For this

reason, they argue, the elements of injury asserted in these cases, which unquestionably affect the value of their property, should be considered in determining damages. While we do not disagree with their assessment of the task of determining value, we cannot allow a recovery of damages not required by the Constitution and section 21.042.

* * * * *

For all the foregoing reasons, we conclude that Schmidt and Austex are not entitled to recover the severance damages they claim. Accordingly, the judgment of the court of appeals is reversed, and the judgment of the trial court is modified to exclude severance damages, and that judgment as modified is affirmed.

NATHAN L. HECHT
Justice

Justice Doggett joins in the judgment only.

862 S.W.2d 1 (Tex.App--Austin 1991)

JUDGMENT RENDERED JUNE 12, 1991

NO. 3-90-172-CV

STATE of Texas and City of Austin,

Appellants,

v.

AUSTEX, LTD., et al., Appellees.

Court of Appeals of Texas,
Austin

June 12, 1991.

Rehearing Denied July 17, 1991

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that

there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that the appellants, State of Texas and City of Austin, pay all costs of this appeal and that this decision be certified below for observance.

IN THE COURT OF APPEALS, THIRD DISTRICT
OF TEXAS,

AT AUSTIN

NO. 3-90-172-CV

STATE OF TEXAS AND CITY OF AUSTIN,

APPELLANTS

vs.

AUSTEX, LTD., ET AL.,

APPELLEES

FROM PROBATE COURT NO. 1
OF TRAVIS COUNTY

NO. 1669,
HONORABLE MICHAEL J. SCHLESS,
JUDGE PRESIDING

The trial-court judgment awards Austex, Ltd. and Cavendish Holdings, Ltd. damages in a statutory eminent-domain proceeding initiated by the State and the City of Austin. The State and the City appeal. We will

affirm the trial-court judgment. For convenience we will refer to the parties as the State and Austex, omitting mention of the other parties.

THE CONTROVERSY

Austex owns 3.76 acres of land located on the northwest corner of U.S. Highway 183 and Fairfield Drive in Austin. (See attached drawing.) There is on the tract a retail complex known as the "Town North Shopping Center." Presently, the Town North Shopping center is directly accessible, via several driveways, from the northbound lanes of Highway 183, from Fairfield Drive, and, indirectly, from Ohlen Road through the neighboring Target lot.

The State plans to raise the main lanes of Highway 183 approximately 37 feet above ground, converting the thoroughfare to a controlled-access highway, with ramps connecting the elevated main traffic lanes to parallel frontage roads on either side. After completion of the project, the Austex tract will abut the northbound

ATTACHMENT

BEST AVAILABLE COPY

frontage road. As a result, automobile traffic on the main traffic lanes will have only indirect access, via the ramps and frontage roads, to and from the Austex tract.

In order to comply with state and federal regulations, the State was required to expand its existing right-of-way by 6-2/3 feet onto the Austex property, taking a strip of 1,275 square feet of that tract as indicated in the drawing. To acquire the narrow strip and to fix the damages payable therefor, the State brought the present statutory cause of action in eminent domain. Tex. Prop. Code Ann. §§ 21.001-.065 (1984 & Supp. 1991).

The jury fixed the damages at $18,932, for the fair market value of the land taken, together with $200,000 for the reduction in the fair market value of the remaining part of the tract. The trial court rendered judgment accordingly and the State appeals.

EVIDENCE OF NON-COMPENSABLE "PROPERTY" INTERESTS

[1] At trial, Austex adduced the testimony of an expert witness who gave his opinion that the State's modification of the highway would reduce the fair market value of that part of the Austex tract from which the narrow strip would be severed. He explained his opinion as follows: the elevation of the main traffic lanes would obscure the shopping center from the view of travellers in those lanes; the plan would re-route automobile traffic from the ground-level streets to the elevated lanes, resulting in less traffic at grade and more indirect communication between the remainder of the parcel and the main traffic lanes; and the construction activity required by the project would impose upon the remainder of the tract various inconveniences.

In points of error one through four and six, the State complains the trial court erred when it admitted, over objection, the explanatory testimony given by the witness regarding the various factors mentioned. The

State reasons as follows: (1) an owner of real property has no "property" right in such intangible incidents of ownership as "visibility" and existing traffic volume or patterns, and cannot, in consequence, recover damages when they are altered; (2) while a greater circuity of travel may occasionally reach the level of a compensable injury, this is true only when it is determined that there exists a "material and substantial" impairment of the owner's "access" to and from his tract, which Austex failed to establish in the present cause; and (3) any injurious effect attribu-

-table to the temporary construction activities or the planned work as a whole amounted to "community damages," and is not legally compensable in an eminent-domain proceeding.

Austex did not adduce the evidence on a theory that traffic pattern and volume, "visibility," and such amounted to independent items of incorporeal property

taken or damaged in the condemnation along with the physical land described in the State's petition, entitling Austex to additional compensation by reason of their status as "property." Instead, Austex adduced the evidence on a theory that it established an adverse "effect of the condemnation on the value of [Austex's] *remaining* property," in the words of § 21.042(c) of the Property Code, Tex. Prop. Code Ann. § 21.042(c) (1984) (emphasis added). That statute applies when a part only of an owner's real property is taken by condemnation and thereby severed from his remaining property. The statute requires that in such cases an estimate be made of the extent of any injury and benefit accruing to the *remaining* property, by reason of the condemnation, and that this effect enter into the calculation of the owner's damages.

We considered these matters at length in *State of Texas and City of Austin v. Robert M. Schmidt, et al.*, 805 S.W.2d 25 (Tex.App.--Austin, 1991, writ filed), in which we handed down an opinion after the present cause was

submitted. In *Schmidt*, we attempted to consider, categorize, and harmonize the many judicial opinions bearing on these vexing distinctions, and we concluded that such evidence was admissible when offered to show the "effect of the condemnation on the value of the owner's remaining property." § 21.042(c). The same issues are raised here. We adhere to *Schmidt* and overrule the State's points of error one through four and six, which relate to the claimed inadmissibility of the witness's testimony referring to loss of visibility, re-routing of automobile traffic, reduction of traffic volume, and the temporary inconvenience attributable to construction activities. We also overrule, on the same basis, the State's points of error contending that the trial court erred when it failed to instruct the jury regarding such evidence.[1]

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[1] In points of error seven, nine through twelve, and fifteen, the State contends the trial court erred by failing to give and by not permitting the condemnor's counsel to argue to the jury various instructions limiting the jury's consideration of evidence of certain of the above-

EVIDENCE OF AN UNACCEPTED OFFER TO SELL

[2] Austex's expert witness was also permitted to testify that he considered, in arriving at his opinion, that Austex had entered into a listing agreement with a broker, in 1988, in which Austex had agreed to sell its property for $1,500,000 on specified terms. The trial court admitted the testimony over the State's objection that the listing agreement was no more than an unaccepted offer to sell the property and evidence of it was not admissible for any purpose. In its fifth and thirteenth points of error, the State complains the trial court erred in overruling the objection and in refusing to instruct the jury that unaccepted offers to sell real estate are not admissible to prove damages.

[3] We need not consider whether admission of the testimony was reversible error. The State

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mentioned factors and prohibiting altogether their consideration of evidence of other items and lost business profits. We overrule the points of error for the reasons stated in Schmidt.

subsequently introduced the listing agreement in evidence for the stated purpose of impeaching the same witness on a different issue, without requesting a limiting instruction that the jury consider the agreement for impeachment purposes alone.[2] The

contents of the listing agreement were substantially the same as the contents attributed to the agreement by the witness in his testimony. Any error in the admission

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[2] When a party objects to certain testimony and the objection is overruled, he is entitled to treat the court's ruling as "the law of the trial" and to explain or rebut the evidence which has been admitted in spite of his objection. The objecting party will not waive error simply by later cross-examining the witness about the testimony to which he previously objected. McCormick, The Law of Evidence, § 55, at 129-30 (1954). The present situation, however, is not one in which the State introduced the listing agreement in order to explain or rebut the testimony of Austex's expert witness regarding the existence and contents of the listing agreement. Although the record is not clear on the matter, the State seems to have offered the listing agreement into evidence in order to impeach Austex's appraisal witness on a statement he had made during his direct examination declaring the value of the Austex property to be $2.1 million, not considering the effect of the condemnation on the property.

of testimony is rendered harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection. Slayden v. Palmo, 108 Tex. 413, 194 S.W. 1103, 1104 (Tex. 1917); City of San Antonio v. Vela, 762 S.W.2d 314, 317-18 (Tex. App. 1988, writ denied); New Hampshire F. Ins. Co. v. Plainsman Elevators, Inc., 371 S.W.2d 68, 72 (Tex. Civ. App. 1963, writ ref'd n.r.e.). We hold accordingly and overrule the State's fifth and thirteenth points of error.

COMMENT ON THE WEIGHT OF THE EVIDENCE

[4] In its fourteenth point of error, the State contends the phrasing of the second jury question constituted a comment on the weight of the evidence in violation of Tex. R. Civ. P. Ann. 277 (Supp. 1991). The question stated as follows:

> What was the decrease, if any, in fair market value of the [remainder of the tract], as improved, immediately after the condemnation . . . , taking into consideration the effect of the condemnation on the value of the remaining property?

The State contends, as it did at trial, that this form of the question constituted a comment on the weight of the evidence because it assumed some effect on the remainder by reason of the condemnation. The omission does not justify reversal of the judgment, however, unless the charge as a whole influenced the jurors' minds on the controlling element of the interrogatory--whether the condemnation caused a decrease in the market value of the remaining part of the tract. *Texas Employers Ins. Ass'n v. McKay*, 146 Tex. 569, 210 S.W.2d 147, 148-49 (1948); Russell v. Great American Indemnity Co., 127 Tex. 458, 94 S.W.2d 409, 410 (Tex. 1936).

[5] We conclude the phrasing of the issue constituted an incidental comment because it assumed the condemnation had *some effect* on the remainder. The assumption did *not* imply, however, that there was some *decrease* in the market value of the remainder--the controlling element of the question. The assumption was neutral on that element. We hold, in consequence, that

the erroneous assumption did not amount "to such a denial of [the State's] rights as was reasonably calculated to cause and probably did cause rendition of an improper judgment." TEX.R.APP.P.. 81 (Pamph. 1990); *McKay*, 210 S.W.2d at 149. We overrule the State's fourteenth point of error.

The State relies upon *Uehlinger v. State, 387* S.W.2d 427 (Tex.Civ.App. 1965, writ ref'd n.r.e.). *Uehlinger* is distinguishable because the erroneous assumption in that case referred directly to the controlling element of the interrogatory.[3]

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[3] In Uehlinger, the trial court instructed the jury, as follows, concerning their consideration of the market value of 3.1714 acres taken in condemnation:

> You are instructed that in determining the market value of the [land] taken for highway construction you shall not take into consideration the increased value of said [land] due to such highway construction.

The instruction referred directly and expressly, of course, to the jurors' calculation of the market value of the land taken, as the court attempted to preclude their improper consideration of enhancement attributable to the project

HEARSAY INSTRUCTION

The expert witness further explained his opinion by reference to his use of the "comparable market approach" as a method of estimating the market value of property. In explaining his use of this "approach," the witness testified that his opinion was based in part upon the hearsay reports of owners of commercial property adjacent to other elevated, controlled-access highways similar to that planned by the State for Highway 183. These reports related that these properties had sustained reduced occupancy rates and rental incomes after completion of the similar projects, which, in turn, reduced the marketability and market value of these properties.

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At the close of the evidence, the State requested that the jury be instructed as follows:

> The facts or data upon which an expert bases his or her opinions may be those perceived by or made known to him at or before trial. If of a type

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itself.

> reasonably relied upon by experts in the field, the facts or data need not be admissible in evidence.
>
> "Hearsay" is a statement, other than one made by the declarant, while testifying at the trial, offered in evidence to prove the truth of the matter asserted.
>
> Hearsay statements are not ordinarily admissible in evidence but certain hearsay information is sometimes relied upon by experts in forming opinions. Such information is not evidence of the facts contained therein but may only be considered as it bears on the expert's opinion.

The trial court refused to give the foregoing instruction. In its eighth point of error, the State contends the court erred in that regard.

[6] The terms of TEX.R.CIV.P.ANN. 277 provide that the trial court "shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." This "rule places no additional requirement upon the trial judge in preparing his charge." *Johnson v. Zurich General Accident & Liability Ins. Co.*, 146 Tex. 323, 209 S.W.2d 353, 354 (1947). The effect of the rule is rather to *permit* instructions on the law, thereby precluding reversal of trial-court judgments on

the ground that such instructions "constituted general charges not permissible in cases tried on special issues. *Zurich General*, 205 S.W.2d at 353.

In *Zurich General*, a party requested that the trial court instruct the jury "that any fact before you may be established by circumstantial evidence or direct evidence, or both." After discussing the meaning of Rule 277, the supreme court stated:

> A holding that a trial court must give a charge on that question of law would logically be followed by holdings that charges of similar character with respect to many other questions of law should also be given. Such practice would be out of harmony with the purposes of trials on special issues.

Zurich General, 205 S.W.2d at 353-54.

[7] In the present cause, the charge gave only three special instructions. Each defined a term used in the charge: "preponderance of the evidence," "fair market value," and "highest and best use." The charge submitted to the jury contained only two questions. The first inquired as to the fair market value of the strip taken; the

second inquired as to any decrease in the fair market value of the land remaining. Because the two jury questions were confined to the fair market value of the land involved in this particular litigation, we cannot see how the jury could fail to understand that the hearsay reports of other owners, about their properties in other locations, were simply factors that the witness considered as he attempted to arrive at an informed estimate and opinion concerning the land involved in the present litigation. We therefore hold the trial court did not abuse its discretion in refusing to give the instruction. *See Mobil Chemical Company v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974); *Johnson v. Whitehurst*, 652 S.W.2d 441, 447 (Tex.App.1983, writ ref'd n.r.e.); Steinberger v. Archer County, 621 S.W.2d 838, 841 (Tex.App. 1981, no writ); *see generally*, 3 McDonald, Texas Civil Practice § 12.14.2, at 270-274 (rev. ed. 1983). The State's eighth point of error is overruled.

REMAINING POINTS OF ERROR

In its sixteenth and seventeenth points of error, the State complains the trial court erred in failing to disregard the jury's finding on the decrease in value of the remaining property and in failing to enter a judgment notwithstanding the verdict because there was "no support in the admissible evidence" or, alternatively, "the evidence was insufficient to support" the jury's finding. These points are contingent on our holding that the trial court erroneously admitted evidence discussed above. We therefore overrule the points of error.

In its eighteenth point of error, the State contends the cumulative effect of all the error in the trial court deprived it of a fair

trial. In light of our holdings above, we overrule the point of error.

We affirm the trial-court judgment.

John Powers, Justice

[Before Justices Powers, Jones and Kidd]
Affirmed
Filed: June 12, 1991
[Do not Publish]

THE SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 2, 1994

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RE: Case No. D-2296

Style: STATE OF TEXAS and CITY OF AUSTIN v. MUNDAY ENTERPRISES ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS, CLERK

Peggy Littlefield

Peggy Littlefield,
Chief Deputy Clerk

868 S.W.2d 319 (Tex. 1993)

STATE of Texas and City

of Austin, Petitioners,

vs.

MUNDAY ENTERPRISES,

et al. Respondents.

No. D-2296

Supreme Court of Texas.

Nov. 24, 1993.

Rehearing Overruled Feb. 2, 1994.

PER CURIAM

This case arises out of the condemnation of part of a commercial tract in order to widen and convert U.S. Highway 183 into an elevated controlled-access highway. The issue here concerns not the value of the part taken, but the compensation recoverable for damages to the remainder. In *State v. Schmidt,* 867 S.W.2d 769 (Tex. 1993), we held that landowners are not as a rule entitled to compensation for a decrease in value of the remainder due to the diversion of traffic, increased circuity of travel, lessened visibility, and interim construction inconvenience. Because the judgment here is based in part on evidence of such factors admitted over the objections of the State and City (together referred to as the State), and in part on evidence of damages to the remainder which the State concedes are compensable, the judgments of the lower courts must be reversed and the case remanded for a new trial.

The property in question is located on the northeast side of U.S. Highway 183 near Lamar Boulevard in Austin. William F. Munday, doing business as Munday Enterprises, owns the property and uses it as the site for Bill Munday's Pontiac, AMC/Jeep and Subaru automobile dealership.[4] The State condemned 1.65 acres of the 15.84-acre tract, taking some buildings, leaving others unacceptably close to the new frontage road, and eliminating driveways and a front display parking area. There will be, the State concedes, a partial, permanent denial of access to the public roadway along 249 feet of the 893-foot perimeter fronting the highway for which Munday is entitled to compensation.

Munday claims that the existing car dealership can no longer continue to operate because of the taking. He presented testimony that the site would no longer be acceptable as a dealership to major manufacturers, and

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[4] The condemners also named as parties lienholders Texas Commerce Bank--Austin, N.A., and First City National Bank of Austin

that the value of the remainder for secondary uses would be significantly reduced, in large part due to the elevation of the highway. An expert witness testified that the market value of the remainder would be diminished because of the decreased visibility of the remainder, the reduced traffic flow on the frontage roads, and the interim construction activity. The State objected to such evidence on the ground that these factors were not compensable and were nonrecoverable community damages. An expert for the State testified that the property could be redeveloped as an automobile dealership. The State also asked for instructions excluding consideration of the circuitry of travel, loss of visibility, diversion of traffic, and construction inconvenience. The case was submitted to the jury on a single question inquiring into the difference in fair market value of the entire tract without considering the taking, and the fair market value of the remainder property after condemnation of the land and

improvements, considering the effects of the condemnation. The jury found this difference to be $8,469,870. The trial court rendered judgment, after deducting the special commissioners' award previously withdrawn, for $6,678,843, plus interest and costs, and the court of appeals affirmed. 824 S.W.2d 643.

The State concedes that the taking of part of the property damaged the remainder and lists as compensable factors a bisected building, a partial, permanent denial of legal access to the roadway along a portion of the adjoining boundary, and the required relocations of building sites and driveways. It

complains, however, that the award of damages was based in part on evidence of factors which were held not to be compensable as a rule in *Schmidt.* We agree that the damage award in this case was based upon evidence of both compensable and noncompensable injuries. For this reason, the State is entitled to a new trial.

The court of appeals relied upon TEX. REV. CIV. STAT. ANN. art. 1085a § 1 (Vernon 1963, Supp. 1993), which provides that "no existing State highway or city street shall be converted into a freeway except with the consent of the owners of abutting lands, or by the purchase or condemnation of their right of access thereto." However, section 3 of that same article provides:

> "Freeway" means a State highway or city street in respect to which the right or easement of access to or from their abutting lands has been acquired in whole or in part from the owners thereof by the State Highway Commission or the governing body of an incorporated city or town as hereinabove provided.

Given this circular definition, article 1085a cannot be said to grant any right of compensation beyond that which the State concedes is compensable for a denial of

"legal access" through a total or partial, permanent denial of access to the public roadways.

Accordingly, a majority of the Court, without hearing oral argument, grants the petition for writ of error, reverses the judgments of the courts below, and remands the case to the trial court for new trial.

824 S.W.2d 643 (Tex.App.--Austin 1992)

IN THE COURT OF APPEALS, THIRD DISTRICT
OF TEXAS,
AT AUSTIN

NO. 3-90-236-CV

STATE OF TEXAS AND CITY OF AUSTIN,

APPELLANTS

vs.

MUNDAY ENTERPRISES, TEXAS COMMERCE BANK-AUSTIN, N.A. AND FIRST CITY NATIONAL BANK OF AUSTIN, f/k/a CITY NATIONAL BANK OF AUSTIN,

APPELLEES

FROM THE PROBATE COURT NO. 1
OF TRAVIS COUNTY,

NO. 1682, HONORABLE J. DAVID PHILLIPS,
JUDGE PRESIDING

Appellants, the State of Texas and City of Austin (collectively, the "State"), appeal from a jury verdict and

trial-court judgment in favor of appellee, Munday Enterprises ("Munday").[1]

--- 645 ---

THE CONTROVERSY

This is another in a series of condemnation actions by the State to obtain property for the widening of U.S. Highway 183 within the city limits of Austin, Texas. This condemnation proceeding concerned a 1.65-acre taking out of a 15.84-acre tract owned by condemnee, Munday. The project in question involves the conversion of U.S. Highway 183 to a controlled-access highway. To eliminate grade crossings, the State intends to raise the main traffic lanes in front of Munday's property some thirty-seven feet in the air. These elevated lanes will connect at intervals to entrance and exit ramps. These

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[1] Two lien holders were also noticed on the original petition in this cause and the objection to the Special Commission award; Texas Commerce Bank-Austin, N.A. and First City National Bank of Austin, f/k/a City National Bank of Austin. Their names however, do not appear in the appellate briefs as parties of record.

ramps will connect in turn to parallel three-lane frontage roads. After completion of the project, Munday's property will adjoin one of the frontage roads. On the new freeway system, motor vehicles on the main traffic lanes will have only indirect access, by way of the frontage roads and ramps, to and from Munday's property.

The condemned property in question is an automobile dealership with several buildings and paved parking areas. Munday contends that immediately prior to the condemnation action, the property in question was one of the finest automobile dealership locations in the City of Austin. Munday alleges that because of the taking, which actually included some buildings and which moved the right-of-way line unacceptably close to other buildings, the existing car dealership could no longer continue to operate. Munday ultimately contends that due to the nature of the new freeway, the remainder property will no longer be adaptable to automobile

dealership use and, therefore, the remainder property, following the condemnation project, will be damaged and its fair market value reduced.

To prove these contentions at trial, the condemnees offered substantial documentary evidence including a three-dimensional model of the property before and after the taking, numerous photographs and plats of the property, maps and drawings of the proposed freeway facility, and photographs showing construction activities similar to those to be undertaken within the part of the property actually condemned. Munday produced testimony from a land planner experienced in the planning and constructing of automobile dealerships; three former high-ranking General Motors executives, who among them had some fifty years of experience in selecting sites for automobile dealerships; two real estate appraisal witnesses with a total of more than sixty years of experience and extensive backgrounds in appraising

automobile dealerships for acquisition and development; and the landowner, Bill Munday.

The condemnee's evidence was premised on the fact that the remainder property, following this condemnation action, would be less valuable than before because it would be damaged for its use as an automobile dealership site. In sum, Munday's witnesses testified that a willing buyer would not pay a willing seller as much money for the Munday tract following the completed freeway project. To justify their opinion of the diminution in value of the remainder property, Munday's experts testified that use of the remainder property as an automobile dealership would suffer because: (l) raising the main traffic lanes and constructing U.S. Highway 183 as a controlled-access freeway would result in more difficult access for prospective customers to reach the automobile dealership; (2) elevating the main traffic lanes would reduce the automobile dealership's visibility from those lanes, which is an important element in any

commercial undertaking and especially new or used automobile sales; and (3) construction activities on the project would interfere with use of the tract during highway construction, which the undisputed testimony indicated would be over a lengthy period of years; all of which would

make the property less desirable to a willing buyer.

The State argued in the trial court below, and contends in its points of error on appeal, that all of this testimony from Munday's expert witnesses was inadmissible and injected non-compensable elements of damage into this condemnation proceeding. The State contends that, since these elements of damages are non-compensable, the trial court erred in not instructing the jury that they could not consider these damage elements for any purpose. Furthermore, the State contends that the damages to the remainder property are the same as those suffered by the community in general

and are therefore non-recoverable. The State's experts testified that the remainder property could be redeveloped as an automobile dealership, and that Munday's remaining land would not be affected at all by the condemnation or construction project.

The trial court submitted the entire cause, which was tried on the sole issue of damages, in a single jury question which required the jury to find the difference between the fair market value of the entire Munday property before the condemnation as contrasted with the value of the remainder property afterwards, considering the effect of the condemnation on the value of the remainder property. *See* TEX. PROP. CODE ANN. § 21.042(c) (1984). The State assigns error in this broad-form submission.

There were also significant pretrial discovery disputes between the parties. Indeed, at one point the trial court entered an order striking all experts for both sides. When the original trial was postponed and reset for

June 1990, the trial court, after motion and hearing, allowed both sides to supplement their discovery responses and to present their expert witnesses at the time of trial. The State assigns this action of the trial court as error.

DISCUSSION AND HOLDING

The Texas Const. art. I, § 17 provides as follows:

> No person's property shall be taken, damaged or destroyed for or applied to the public use, without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall first be made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

The Texas Property Code provides that in the assessment of damages the special commissioners (and trial jury) may consider the following:

> (b) If an entire tract or parcel of real property is condemned, the damage to the property owner is the local market value of the property at the time of the special commissioners' hearing.

(c) If a portion of a tract or parcel of real property is condemned, the special commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including the effect of the condemnation on the value of the property owner's remaining property.

TEX. PROP. CODE ANN. § 21.042(b), (c) (1984).

Texas is one of only twenty-six states that provides by its constitution, as well as by statute, that the landowner is entitled to recover not only the value of the portion of the land that is actually taken, but also any damage or destruction that is done to the remaining property as a result of the condemnation project. *See* F. Russell Kendall, *Special and Community Damages - A Confusion in Definition*, 10 HOUS. L. REV. 282 (1973). This damage to the remainder property is the issue in this cause. In the landmark case of *State v. Carpenter*, 89 S.W.2d 194 Tex. 1936), the Texas Supreme Court set out the evidentiary rules for establishing the damages recoverable by a landowner in a condemnation case. The

Carpenter court determined that the ultimate question was one of market value and the depreciation, if any,

in the market value of the remainder property as a result of the condemnation action. The Court defined market value in terms of what the property would bring in a transaction between a willing seller and willing buyer. *Carpenter*, 89 S.W.2d at 201-02; see also *City of Austin v. Cannizzo*, 267 S.W.2d 808, 812 (Tex. 1954). Following *Carpenter* and *Cannizzo*, the Texas Supreme Court has repeatedly and specifically acknowledged the "willing-seller/willing-buyer" test of market value in partial taking cases. *See Spindor v. Lo-Vaca Gathering Co.*, 529 S.W.2d 63 (Tex. 1975); *State v. Walker*, 441 S.W.2d 168 (Tex. 1969).

Evidence of Non-Compensable Damages

In points of error two and three, the State argues that the jury's verdict is not supported by admissible evidence because the trial court erred in allowing

Munday's witnesses to testify to non-compensable elements of damage in arriving at their opinions regarding the diminution in value of the remainder tract. In points of error four, five, six, and seven, the State argues that the court improperly failed to instruct the jury that they could not consider noncompensable elements of damage and failed to instruct the jury that community damages were not recoverable. Finally, in its eighth point of error, the State contends that the trial court erred in denying its motion for mistrial because of Munday's reliance upon non-compensable elements of damage.

[1] At the outset, we should note that Munday's witnesses did not introduce the disputed evidence on the theory that these damages were recoverable as *separate damage elements*, but instead as justification for their opinion that the value of the remainder tract had been damaged and its market value reduced. In addition, the trial court gave a limiting instruction to the jury in the court's charge as follows:

> You are instructed that you may consider the evidence you have heard relating to such matters as access, visibility, and the construction project to the extent that you believe that such factors may affect the FAIR MARKET VALUE of the remaining property as of August 30, 1989, if at all, and only to that extent. Such evidence is not to be considered as showing separate elements of damage independent of the Fair MARKET VALUE of the remainder.

The evidentiary rules as set out in *Carpenter*, and *City of Pearland v. Alexander*, 483 S.W.2d 244 (Tex. 1972), substantiate that Munday's evidence was admissible for consideration by the trier of fact as bearing upon the question of damage to the remainder property. In *Alexander*, the Texas Supreme Court held:

> [W]here a part of a tract of land has been taken for a public use, damages to the remainder tract are to be determined by ascertaining the difference between its market value immediately before and after the appropriation, taking into consideration the nature of the improvement, the use to which the land taken is to be put, and all circumstances which tend to increase or diminish the present market value. The recovery is for damages which reasonably could have been foreseen and determined at the time of the condemnation. (Citation omitted.) *The willing-seller/willing-buyer test of market value is to be applied and those factors are to be considered*

> *which would reasonably be given weight in negotiations between a seller and a buyer.* (Citation omitted.)

483 S.W.2d at 247 (emphasis added). Therefore, we hold that the evidence introduced by Munday's expert witnesses, which established the diminution in value of the remainder property as a result of the willing-buyer/willing-seller fair market value test, was admissible under the decisions of the Texas Supreme Court.

[2] The State argues that the trial-court judgment must be set aside because it is based upon non-compensable condemnation elements of damage such as Munday's loss of access, visibility, and inconvenience as a result of freeway construction. This Court has specifically rejected this contention in *State v. Schmidt*, 805 S.W.2d 25 (Tex. App. 1991, writ granted), and in an unpublished

opinion, *State of Texas and City of Austin v. Austex Ltd.*, No. 3-90-172-CV (Tex. App.-Austin, June 12, 1991, writ granted). We continue to adhere to these holdings. To do otherwise would result in Munday's property being taken without just compensation in violation of article I, § 17 of the Texas Constitution and Section 21.042(c) of the Tex. Prop. Code Ann. (1984). Access rights are valuable rights which must be considered in determining the fair market value of Munday's remainder property. *See* William Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 Tex. L. Rev. 733 (1969); Madison Rayburn, *Legal Rights and Legal Fictions in Condemnation*, 10 HOUS. L. REV. 251 (1973).[1] In

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[1] After considering Texas Supreme Court opinions such as *Carpenter, Cannizzo, Alexander* and others, Rayburn declared:

> These opinions, generation after generation, have shown that in condemnation cases we are dealing with elements of value and elements of damage and that any fact (yes, even circuity of travel to and from property) that makes the remaining land less valuable, or any fact

addition, we note that there is further statutory authority for allowing Munday's experts to introduce evidence regarding loss of access rights. Article 1085a of the Revised Civil Statutes regarding the subject of freeways provides:

> Section 1. The State Highway Commission or the governing body of any incorporated city or town, within their respective jurisdictions may do any and all things necessary to lay out, acquire,

---

> that benefits or makes it more valuable, is and should be admissible on trial. . . .
>
> So long as we continue to measure the damages or value of remainder land by its before and after market value, by the willing seller-willing buyer concept, which is purely an economic one, then it is inescapable that good access or bad access, a high or low traffic count, a good central location or a poor inaccessible location, utilities or no utilities, corner or no corner, one-way or two-way traffic, and no access or impaired access have been and always will be economic factors that a buyer or seller will take into monetary account when they go into the market place to buy or sell. Location is the keystone and soul of economics of market value of lands that are the subject of property ownership.

Rayburn, *supra* at 259.

> construct, maintain and operate any section or portion of any State highway or city street as a freeway, and to make any highway or street within their respective jurisdictions a freeway, except that no existing State highway or city street shall be converted into a freeway, *except with the consent of the owners of abutting lands, or by the purchase or condemnation of their right of access thereto*, providing, however, nothing herein shall be construed as requiring the consent of the owners of abutting lands where a State highway, or city street is constructed, established or located for the first time as a new way for the use of vehicular and pedestrian traffic.

TEX REV. CIV. STAT. ANN. art. 1085a (1963) (emphasis added).

The State relies upon a number of cases that, *in the abstract*, seem to buttress its contention that rights to access and visibility as well as construction inconvenience are not compensable in condemnation actions. These cases can be classified generally in one of two categories which render them distinguishable from the present cause: (l) inverse condemnation cases; and (2) cases where the condemnee seeks to recover damage elements *in addition to* fair market value damages.

In the first category of cases cited by the State, e.g., *City of Austin v. Avenue Corp.*, 704 S.W.2d 11 (Tex 1986), *City of Houston v. Fox*, 444 S.W.2d 591 (Tex. 1969), and the other pure inverse-condemnation cases, the real issue addressed by the Texas Supreme Court is not the nature of the evidence to be admitted on the amount of damages but rather, whether the condemnor is liable for a taking *at all* under the provisions of art. I, § 17 of the Texas Constitution. In the second category of cases the State cites, statutory condemnation proceedings, the landowners attempted to recover lost profits due to damages to their on-going businesses *in addition* to recovery for the fair market value of the land taken and for remainder damages. *See, e.g., State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863 (Tex. 1988); *State v. Sungrowth VI, California Ltd.*, 713 S.W.2d 175 (Tex. App. 1986, writ ref'd n.r.e.); *State v. Lock*,

468 S.W.2d 560 (Tex. Civ. App. 1971, writ ref'd n.r.e.). In such cases, the landowners are also obliged to prove inverse condemnation as the predicate for recovering damages outside the statutory test of fair market value. *Sungrowth VI*, 713 S.W.2d at 177. All of these cases are inapplicable to the case at bar and we do not find them persuasive. Thus, based upon the established holdings of *Carpenter, Cannizzo, Alexander*, and others, as well as sound constitutional and statutory principles, we hold that Munday established by admissible and competent testimony a diminution in the fair market value of his remainder property for which he was entitled to be compensated. The State's points of error two, three, five, six, seven, and eight are overruled.

Community Damages

[3, 4] In its fourth point of error, the State contends that the trial court erred in not giving a limiting instruction to the jury on community damages. In conjunction with this point of error, the State cites

well-established eminent-domain law for the proposition that the jury in estimating injury or benefit to the remainder property "may not consider an injury or benefit that the property owner experiences in *common* with the *general community*." TEX. PROP. CODE ANN. § 21.042(d) (1984) (emphasis added). However, the State's argument in this regard is premised upon a basic misconception. The State would have us define "general community" as all of Munday's neighboring condemnee-landowners along U.S. Highway 183. The State takes the position in its brief that Munday has not met his burden of proof because he has not shown that his remainder damages are any different "than all other property on State Highway 183" and, therefore, the State argues Munday's damages are not compensable. We reject this construction of the term "general community damages."

The Texas Supreme Court in *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 831 (Tex. 1974), stated: "[t]he objective of the judicial process under the constitution

and statutes is to make the landowner whole and to award him only what he could have obtained for his land in a free market." Were we to adopt the State's definition of the term "community damages," no landowner who suffered the same type of remainder damages as his neighboring condemnees would be entitled to the compensation guaranteed him by the Texas Constitution and Statutes. We hold that the term "general community" means the community *at large* and is not limited to other condemnee-landowners of the project in issue. *See Haynes v. City of Abilene*, 659 S.W.2d 638, 641 (Tex. 1983). We reject the State's narrow definition of the term "community damages."

We are aware of the holding in *Olson v. Harris County*, 807 S.W.2d 594 (Tex. App. 1990, writ denied), which arguably conflicts with some aspects of our holding in the instant cause. However, we believe that a close reading of *Olson* shows it is in harmony with the principles which we have espoused.

Olson was a partial taking case. The landowner's remainder property in *Olson* fronted on an elevated freeway. Olson's complaint was that an "extraordinarily high and steep" ramp was directly in front of his remainder property and "he thought there was a danger of flying debris from the ramp." *Olson*, 807 S.W.2d at 595-6. He also complained of increased traffic noise from the ramp. The opinion does not reveal any testimony that Olson's concerns diminished the fair market value of his remainder property. To the contrary, an independent appraiser testifying for the condemnors, stated that the value of Olson's remainder property was actually enhanced by the project. That appraiser demonstrated with comparable sales that remainder properties along the freeway were actually worth more as a result of the project.

Olson was a non-jury trial before the court. At the conclusion of all the evidence, the trial court held that the landowner was not entitled to remainder damages

because his damages were those shared by the "general community" and thus were non-compensable. The appellate

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court upheld the trial court's judgment and the supreme court denied application for writ of error.

In harmonizing *Olson* with the opinion we have expressed herein, several observations are in order:

1. The trial court in *Olson* held all the evidence to be admissible, which is in conformity with the actions of the trial court in the instant case and contrary to the State's argument.

2. In *Olson* there appears to be no testimony from the landowner-witnesses that the dust, noise, and traffic hazards had any effect upon the fair market value of his remainder property. In the instant case, there is substantial, and in many instances, uncontroverted evidence that the fair market value of the Munday

remainder property was significantly impaired and diminished.

3. The court in *Olson* observes that much of the landowner's concern, especially that regarding the danger of flying objects, was speculative. On the other hand, there is ample evidence in this record that Munday's damages are not speculative.

4. *Olson* reached the appellate court upon a record of negative findings by the trier of fact whereas in the instant case we are asked to review evidence which resulted in a favorable jury verdict. The court in *Olson* comments that the burden of establishing remainder damages rests with the landowner and that Olson simply had not carried his burden of proof.

5. Finally, a careful reading of *Olson* indicates that the holding of the court of appeals is a very *narrow* one. After observing that it is up to the trial court to hear and weigh all of the evidence and the testimony of the witnesses, that court states: "We hold that the trial court

did not err in concluding that damages shared by the community were not compensable as a matter of law." *Olson*, 807 S.W.2d at 596. Certainly, this Court does not disagree with that statement of condemnation law.

In the final analysis, in harmonizing *Olson* with our present opinion, we believe that there were significant procedural and factual differences, both in the nature of the legal theories and the quantum of the testimony, which resulted in a different appellate conclusion in *Olson* from the one that we reach here. However, to the extent that *Olson* can be read to conflict with our holding, we decline to follow it.

Therefore, we conclude that Munday's remainder damages were not "general community damages" and the trial court did not err in the instructions given and refused in conjunction with the charge. The State's fourth point of error is overruled.

Court's Charge

[5] The trial court submitted this condemnation case upon a single broad-form damage issue which required the jury to find the difference in value between the Munday tract as it existed before the condemnation project was initiated, and the Munday remainder property after the condemnation, taking into account the effects of the project itself.[1]

The State complains in its first point of error that the trial court submitted an improper jury question. Munday responds that the court's charge followed the

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[1] The jury issue actually submitted was:

QUESTION

Find the DIFFERENCE between the FAIR MARKET VALUE of:

(a) The entire Munday Enterprises tract of land, as improved, without any reference to or consideration of the taking or proposed project; and,

(b) The remainder property, after condemnation of the land and improvements taken, considering the effects of the condemnation on the value of the remaining property.

ANSWER IN DOLLARS: $_____

most recent and authoritative law on the subject. *See Callejo v. Brazos Elec. Power Coop., Inc.*, 755 S.W.2d 73 (Tex. 1988). The Texas Supreme Court therein stated that in condemnation cases, the following should be observed:

> The measure of damages in a condemnation proceeding is the difference in mar-
>
> ---- 651 ----
>
> ket value of the land immediately before and immediately after the taking. *City of Pearland v. Alexander,* 483 S.W.2d 244, 247 (Tex. 1972). Future condemnation cases should be submitted broadly in terms of the difference in value rather than asking separate questions on pre- and post-taking values.

Id. at 76.

Even though the State concedes that the charge was in compliance with the *Callejo* decision, it seeks to distinguish *Callejo* upon the basis that *Callejo* was an easement taking as contrasted with a partial taking in fee. Such a distinction is of no consequence and the trial court properly rejected it.

The State preferred a single special issue that would have required the jury to find compensation in a two-step process by adding together the value of the part taken and the decrease, if any, in the before and after value of the remainder property. While there are certain circumstances where such a two-step process might be required, as for example where the landowner does not want enhancement of the remainder property offset against the value of the part of the property taken in condemnation, this case did not present such an unusual circumstance to require deviation from the approved charge set out in *Callejo*.

[6, 7] Further, Munday contends that the State has waived any error by not properly objecting to the sole issue as submitted. We agree. Objection is the proper method of preserving complaint as to an issue actually submitted but claimed to be defective, regardless of whether the issue is one relied upon by the complaining party or his opponent. *Vela v. Alice Specialty Co.*, 607

S.W.2d 289, 291 (Tex. Civ. App. 1980, no writ). Texas Rules of Civil Procedure, Rule 274, provides: "A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection." Tex. R. Civ. P. Ann. 274 (Supp. 1991). We have searched the record and cannot find where the State ever objected to the question as submitted. While it is true that the State tendered its own requested issue, this does not preserve *by objection* its point of error. We conclude that the point has been waived.

[8] However, even had the point not been waived, it is difficult to see how the State has been harmed. In contrasting the two submissions, that of the trial court as given and that of the State as requested, it is difficult to understand the State's contention that a jury would reach a different result in either instance. A jury's damage award which finds the difference between Munday's entire tract before the condemnation as contrasted with the value of the remainder tract after the

condemnation should be identically the same monetary award as the jury determining separately the value of the part taken, and then the decrease of the value in the remainder property before and after the condemnation. Therefore, we hold that even if the State properly preserved its objection, the State would be unable to show harm by the submission in question. The State's point of error one is accordingly overruled.

Discovery Dispute

In its ninth and final point of error, the State argues that all of the expert testimony Munday presented should have been struck for failure to verify supplemental interrogatory answers. The State's point is without merit.

[9] During pretrial discovery, Munday timely filed *unverified* supplemental answers to certain interrogatories. Later, within thirty days of the date set for trial, Munday filed the same supplemental answers but this time with the proper verification. At a pretrial hearing, the trial court struck Munday's expert witnesses

because of his failure to properly verify the supplemental answers within thirty days of trial and also struck the State's expert witnesses because of other unrelated discovery disputes. On the original trial date, the case was not reached and the trial was continued for several months. Munday then filed with the trial court a motion to reconsider the court's earlier ruling regarding the striking of expert witnesses. After

notice and hearing, the trial court entered an order permitting both sides to present expert witnesses at the time of the postponed trial.[1] The State attacks this action of the trial court on the basis that there was no justifiable "good cause" shown as required by the rules. TEX. R. CIV. P. ANN. 215(5) (Supp. 1991). The State maintains that although the trial court's order was more than thirty days before the postponed trial setting, the

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[1] The entry of this order was more than thirty days in advance of the new trial setting.

court had no discretion to reconsider the earlier order to strike expert witnesses. We disagree.

Discovery sanctions pursuant to Rule 215(5) are within the sound discretion of the trial judge, subject only to the requirement that the sanctions be *just*. *Transamerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). In *Powell*, the Texas Supreme Court observed that sanctions are a matter within the sound discretion of the trial court and should be exercised so that discovery-abuse punishment would "fit the crime." *Id.* at 917. In the instant cause, the State raises a technical violation of the discovery rules as a result of Munday's failure to verify the first set of supplemental interrogatories filed. This violation was later corrected. The trial court, after notice and hearing, concluded that the trial should proceed with both parties' experts testifying. The test to be applied by this Court is whether this action by the district judge constitutes a clear abuse of discretion.

In a recent opinion, an appellate court held that verification of supplemental answers to written interrogatories is unnecessary if the original answers are properly verified. *Jones v. Kinder*, 807 S.W.2d 868 (Tex. App. 1991, no writ). In the wake of *Powell* and *Kinder*, we hold that the trial court in this cause exercised sound discretion in the manner in which it handled the pretrial discovery disputes. *Cf. Service Lloyds Ins. Co. v. Harbison*, 35 TEX. SUP. CT. J. 95 (Nov. 6, 1991) (where a trial court, after a hearing on objections to an expert witness interrogatory then ordered answers to be filed, answers were timely despite the fact that they were filed only seventeen days before trial). We refuse to overturn a jury verdict and district court judgment on a highly technical verification error, one of form and not of substance. The State's point of error nine is overruled.

Having concluded that there was no error in the trial below, we affirm the judgment of the trial court.

Mack Kidd, Justice

[Before Chief Justice Carroll, Justices Aboussie and Kidd]

Affirmed

Filed: January 15, 1992

[Publish]

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John T. Adams, Clerk

February 2, 1994

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RE: Case No. D-3627

Style: STATE OF TEXAS and CITY OF AUSTIN v. DONNIE RUTH MORE EDWARDS ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS, CLERK

Peggy Littlefield

Peggy Littlefield,
Chief Deputy Clerk

868 S.W.2d 321 (Tex. 1993)

STATE of Texas and City

of Austin, Petitioners,

vs.

Donnie Ruth Moore EDWARDS

et al., Respondents.

No. D-3627

Supreme Court of Texas.

Nov. 24, 1993.

Rehearing Overruled Feb. 2, 1994.

PER CURIAM

This case involves the condemnation of a strip of land in connection with the modifications to U.S. Highway 183 in Austin. We described those modifications in some detail in *State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993). In this case the State of Texas and the City of Austin condemned a 1,096-square-foot strip along the highway. The strip is part of a 21,750-square-foot tract of commercial property located a block away from the properties involved in *Schmidt*. The issue here, as it was in *Schmidt*, is whether landowners who have part of their property taken by power of eminent domain to convert a highway into a controlled-access freeway must also be compensated for a decrease in value of the remainder caused by diversion of traffic, increased circuity of travel, lessened visibility, and interim construction inconvenience. 867 S.W.2d 769 (Tex. 1993). There is no dispute over the value of the strip of land

actually taken; the challenge concerns only the jury's award of $103,270 as damages to the remainder.

Landowners introduced evidence on the nature and duration of construction activities

and the decrease in market value of the remainder due to the highway modifications, loss of visibility, loss in traffic flow on the frontage roads, and the effects of construction activity. The State and City objected to the admission of evidence of noncompensable "community" damages and requested that the jury be instructed no to consider circuity of travel, diversion of traffic, construction inconvenience, and loss of visibility in assessing damages. The trial court overruled these objections and rendered judgment on the verdict. The court of appeals affirmed. 867 S.W.2d 769.

It appears that the only claims of damage to the remainder are for injuries *Schmidt* holds are noncompensable. For the reasons explained in *Schmidt*,

a majority of the Court, without hearing oral argument, grants the petition for writ of error, reverses the judgment of the court of appeals, modifies the judgment of the trial court to delete the award of $103,270, and affirms that judgment as modified.

867 S.W.2d 380

STATE of Texas and City

of Austin, Appellants,

v.

Donnie Ruth Moore EDWARDS,

et.al., Appellees.

No. 3-90-272-CV.

Court of Appeals of Texas,

Austin.

Jan. 20, 1993.

Released for Publication Dec. 8, 1993.

This appeal arises from a statutory condemnation case. The taking is for expansion of U.S. Highway 183. The trial court rendered judgment on the jury's verdict

awarding the landowners damages to their remaining property. The condemnors, State of Texas and City of Austin (collectively, the "State"), appeal claiming errors in various evidentiary rulings by the court and in the court's charge. We will affirm the judgment of the trial court.

BACKGROUND

This case involves the acquisition of a strip of land from a retail lot at the corner of U.S. Highway 183 and Clearfield Drive in Austin, Texas. At trial, the jury heard evidence that

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the State intends to convert U.S. 183 to a limited-access freeway, with at-grade three-lane frontage roads running both directions and main lanes on pier structures approximately 30 feet above grade in front of the condemned property. Further, there was testimony of the nature and duration of road-construction activities the State plans in front of the landowner's property.

The landowners presented expert testimony that the market value of their remainder property was reduced by the effect of the condemnation project. This expert opinion testimony was supported by detailed market data which was presented to the jury in both sworn testimony and trial exhibits.

The State's expert witness testified that the proposed highway improvements and construction project would have no impact on the market value of the landowner's remaining property.

There was no contest over the value of the part taken; the jury found $103,270.00 as damages to the landowner's remainder property.

The State brings froth nine points of error. In points of error one through six, the State claims that the trial court erred in permitting the introduction of inadmissible testimony. In points of error seven and eight, the State contends that the court's charge should have contained a limiting instruction regarding non-

recoverable "community damages." And, finally, in its ninth point of error, the State contends that cumulative error requires reversal.

DISCUSSION

Admissibility of Evidence

[1] In a series of condemnation cases involving the U.S. Highway 183 project, the State has taken the position that the landowner is attempting to recover statutory condemnation damages that are non-compensable. *See State v. Munday Enters.*, 824 S.W.2d 643 (Tex.App.--Austin 1992, writ requested); *State v. Schmidt*, 805 S.W.2d 25 (Tex.App.--Austin 1991, writ granted)[1] These non-compensable elements generally involve the loss of access to the landowner's remaining property by the grade elevation necessary for the condemnation project, the loss of visibility resulting to the remainder property as a result of the elevated roadway,

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[1] *See also* our recent decision in *Honorable Dan Morales, Attorney General of the State of Texas v. Chrysler Realty*, 843 S.W.2d 275 (Tex.App.--Austin 1992, n.w.h.).

and the construction disruption and inconvenience that results to the remainder property. We held in both *Schmidt* and *Munday* that while the values of these items are not recoverable as separate items of damage, evidence of their values is admissible on the question of diminution in the fair market value of the landowner's remainder property. In the instant cause, the trial court permitted the introduction of this type of evidence. We reaffirm our prior holdings that this evidence is admissible on the question of remainder damages. Accordingly, the State's points of error one through six are overruled.

Community Damages

In its seventh and eighth points of error, the State complains that the trial court erroneously permitted the introduction of evidence of non-compensable "community damages" and failed to submit in the court's charge a curative limiting instruction to the jury to the effect that the jury's verdict should not award the landowners any

"community damages." The landowners respond that no error is presented because, in fact, no evidence of community damages, as that term is properly defined in eminent-domain law, was admitted at trial. We agree.

[2, 3] As we observed in *Munday,* the State takes the position in these condemnation cases that remainder damages shared in common by all the condemnee-landowners of the project are "community damages" and hence non-recoverable. We reject this argument. We reiterate our holding in *Munday* that the term "general community damages" refers to the community *at large* and is not limited to other condemnee-landowners of the condemnation project in issue. *Munday,* 824 S.W.2d at 649. A limiting instruction on the general proscription regarding community damages would have only served to confuse the jury in this case. The trial court

properly refused to grant the requested instruction. Accordingly, the State's points of error seven and eight

are overruled. Finally, in its ninth point of error, the State claims that all of its points presented cumulative error. Since we find no error present in the trial below, point of error nine is overruled. We affirm the judgment of the trial court in all respects.

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March 9, 1994

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RE: Cause No. D-4071

Style: THE STATE OF TEXAS
v. TOM T. ALLEN ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

cc: Ms. Georgia Flint
Commissioner of Insurance

Mr. Stephen Crawford
Vice President

870 S.W.2d 1 (Tex. 1994)

The STATE of Texas, Petitioner,

vs.

Tom T. ALLEN et al., Respondent.

No. D-4071

Supreme Court of Texas.

Jan. 5, 1994.

Rehearing Overruled March 9, 1994.

PER CURIAM

This is yet another case arising out of the condemnation of part of a commercial tract in order to widen and convert U.S. Highway 183 in Austin, as described in detail in our opinion in *State v. Schmidt*, 867 S.W.2d 769. In this case, the State of Texas condemned a 1,240 square foot strip of an 18,750 square foot

commercial property located at 8317 Research Boulevard. The principal issue here, as in *Schmidt* and related cases, is whether the condemnees are entitled to compensation for a decrease in value to the remainder due to diversion of traffic, increased circuity of travel, lessened visibility and interim construction inconvenience. 854 S.W.2d 228. The parties disputed all market values necessary to decide the case, including the market value of the whole property before the taking, the market value of the remainder before and after the taking, the market value of the strip taken, and the decrease in market value of the remainder. As to the latter, they disputed both the amount of that decrease caused by various factors and the best use of the property before and after the taking.

[1] Thus, both the condemnees of the property and the State introduced evidence on the total decrease in the market value of the remainder as a result of the taking, and on the sources of that decrease. Both sides introduced testimony as to the magnitude of the effect of

so called "Schmidt factors" on the market value of the remainder, for the most part without objection. At the end of the trial, the State requested the judge to instruct the jury not to consider "community damages" or "Schmidt factor" damages--including loss or decrease of traffic volume, circuity of travel, impairment of ingress and egress[1], and annoyance and inconvenience

due to construction--in their determination of the dollar amount of decrease in fair market value to the remainder after the taking. The State also requested that the question posed to the jury concerning the decrease in market value of the remainder also exclude decrease due to community damages. The court refused to include any

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[1] In *State v. Schmidt*, 867 S.W.2d 769, 775 (Tex. 1993) we indicated our approval of the holding of *City of Austin v. Avenue Corp.*, 704 S.W.2d 11 (Tex. 1986), that damages may be recovered for a total temporary or partial permanent restriction of access, or a partial temporary restriction of access due to illegal or negligent activity, but we further held that damages due to mere impairment of access caused by construction activity are not compensable.

of the State's requested instructions in its charge. The jury subsequently determined that the decrease in market value of the remainder was $116,000.00, and the fair market value of the strip taken by the State was $17,980.00. The trial court rendered judgment for the total amount of $133,980.00. The State appealed, and the court of appeals affirmed. Now the State asks this Court to reverse and remand the case for a new trial, on the ground that the trial court's refusal to instruct the jury not to consider "community damages" or "Schmidt factor" damages was error.

[2] For reasons explained in *Schmidt*, we agree with the State and reverse and remand the case for a new trial.[2] Because the best use of the property issue was

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[2] We reject the condemnees' argument that the State has waived its argument as to the legal measure of damages by failing to timely object on admissibility grounds to the condemnees' introduction of evidence as to the "Schmidt factor" and "community" damage to the remainder. We note that the State did, in fact, enter such an objection; that the State does not contest the admissibility of that evidence in their Application for Writ of Error to this Court; and that the condemnees did not

disputed, and a change in the best use due to the taking can create compensable damages to the remainder in some cases, we remand the case for a new trial rather than modify the judgment to delete the award of $116,000.00 for consequential damages to the remainder due to factors discussed in *State v. Schmidt.*[3]

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raise this waiver argument in the court of appeals.

[3] Because we reverse and remand on the *Schmidt* grounds, we do not need to consider the State's argument that the trial court likewise erred in refusing to allow the State to supplement its answers to interrogatories within the thirty days before trial pursuant to TEXAS RULES OF CIVIL PROCEDURE 166b(6).

854 S.W.2d 228

IN THE COURT OF APPEALS,

THIRD DISTRICT OF TEXAS,

AT AUSTIN

JUDGMENT RENDERED MAY 5, 1993

NO. 3-92-114-CV

STATE OF TEXAS

V.

THOMAS T. ALLEN AND WIFE,

KATHY ALLEN, ET AL.

APPEAL FROM PROBATE COURT NO. 1

OF TRAVIS COUNTY

BEFORE JUSTICES POWERS, ABOUSSIE

AND B. A. SMITH

AFFIRMED - OPINION BY JUSTICE POWERS

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that the appellant, The State of Texas, pay all costs relating to this appeal, both in this Court and the court below, and that this decision be certified below for observance.

IN THE COURT OF APPEALS, THIRD DISTRICT
OF TEXAS,

AT AUSTIN

NO. 3-92-114-CV

STATE OF TEXAS,

APPELLANT

vs.

THOMAS T. ALLEN AND WIFE,
KATHY ALLEN, ET AL.,

APPELLEES

FROM THE PROBATE COURT NO. 1
OF TRAVIS COUNTY

NO. 1709, HONORABLE MICHAEL J. SCHLESS,
JUDGE PRESIDING

—— 229 ——

In a statutory condemnation action, the State of Texas recovered title to a narrow strip across a tract of land owned by Thomas T. Allen and others. Based on the jury's verdict and a stipulation of the parties, the trial court awarded the owners $133,984 in compensation. The

sum represents the amount of money necessary to compensate the owners for damage to the remainder of their property, as found by the jury, plus the amount stipulated by the parties as the reasonable market value of the strip taken by the State. See Tex. Prop. Code Ann. § 21.042(b), (c) (West 1984). The State appeals. We will affirm the trial-court judgment.

THE CONTROVERSY

The owners' land abuts the right-of-way line of U.S. Highway 183 in Austin and is situated in an area devoted to commercial uses. Before these proceedings, motor vehicles might be driven directly between the owners' land and the traffic lanes of Highway 183. The City intends, however, to convert Highway 183 to a controlled-access highway. To eliminate grade crossings, the conversion will include raising the main traffic lanes about 37 feet. These elevated lanes will connect at intervals to ramps. The ramps will connect in turn to parallel frontage roads on either side and by them to the

general system of public streets in Austin and the vicinity. The owners' land and the narrow strip taken are thus situated much like those in State v. Munday Enterprises, 824 S.W.2d 643 (Tex. App. -- Austin 1992, writ requested), and State v. Schmidt, 805 S.W.2d 25 (Tex. App.-Austin 1991, writ granted). As indicated below, the

State's appeal raises issues of law decided in those earlier decisions.

The State brings seven points of error. The first three complain of the trial-court rulings on certain of the State's pretrial motions; the last four complain of trial-court rulings regarding the court's charge to the jury and the admission of certain evidence.

PRETRIAL MOTIONS

Both the State and the owners objected to the commissioners' award in October 1989. There was no activity in the case, so far as our record indicates, until early February 1991 when, by agreement, the cause was

set for a jury trial to be held October 21, 1991.

In June 1991, the State filed and served upon the owners written interrogatories. One interrogatory inquired "[w]hat is the highest and best use of the whole Property and the Remainder involved in this lawsuit, both prior to and after the taking, as said uses are considered . . . by each and every person or expert who will express an opinion of fair market value and/or highest and best use at trial." In their answers served on the State, the owners responded that their expert witness, Mr. McNabb, would be their witness regarding such matters and that he "has not yet reached his value conclusions or completed his report." The owners stated they would supplement their answer as soon as possible after receiving McNabb's conclusions.

A little more than thirty days before trial was to begin October 21, 1991, the owners had not supplemented their answer to the foregoing interrogatory. The State also had not supplemented certain of its

answers to interrogatories propounded by the owners. On September 19, 1991, the parties agreed, in a writing filed in the cause, that "discovery supplementation shall be considered timely [if] filed on or before 5:00 p.m. on Monday, September 23, 1991," and neither "will object to the timeliness of materials produced before that time." This date, September 23, 1991, was a day *within* thirty days before trial. Rule 166b(6)(b) of the Texas Rules of Civil Procedure provides as follows:

> If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, *but in no event less than thirty (30) days prior to the beginning of trial except on leave of court.*

(emphasis added). The Rule also provides that the trial court might require or permit later supplementation if "the court finds that a good cause exists" for doing so. The apparent effect of the parties' agreement was to permit supplementation as late as September 23, 1991,

without objection by either party, notwithstanding the requirements of Rule 166b(6)(b).

On September 23, 1991, the last day possible to supplement answers under the parties' agreement, the owners supplemented their answer to the interrogatory quoted above. Their answer declared that the highest and best use of the property before the taking was a "Free standing restaurant" and, after the taking, "Destination retail/commercial."

Seven days later, on September 30, 1991, the State moved the trial court for leave to supplement its own answers to interrogatories previously propounded by the owners. The request was based on the following factors averred in the motion:

1. The State had "exercised due diligence in attempting to learn the highest and best use of the subject property as claimed by the Defendants and their appraisers."

2. To prepare properly for trial the State needed "to employ someone with expert knowledge in location rental and sale of restaurants," a specialized field, in order "to

determine the feasibility of the site having a restaurant potential" and values.

3. The State had asked its "existing experts . . . to formulate opinions as to the potential development of the [owners'] property as a restaurant site" and "is seeking to employ a person with knowledge of the . . . Austin restaurant market to investigate and form his opinions as to suitability, costs, rentals and adaptability of the subject site as a restaurant location."
4. The foregoing "cannot be done within sufficient time to comply with the Rules of Civil Procedure and may not be capable of being done within the three weeks remaining until trial."

If denied leave to supplement its answers to interrogatories, the State requested in the alternative a continuance of the cause.

The trial court denied all relief on the State's motion. As a result, the State contends, it was forbidden to introduce at trial the opinions of its expert witnesses to the effect that the remaining property could not lawfully have been used as a restaurant site, after the taking, under existing city ordinances.

[1] In its appeal, the State contends in its first three points of error that the trial court abused its discretion in denying relief on the motion described above. In that connection, we observe that the burden lay upon the State to show the requisite good cause for supplementing its answers to its opponent's interrogatories; in this Court, the burden lies upon the State to bring us a record demonstrating the trial court abused its discretion in failing to find good cause.

The substance of the State's argument is that it was "ambushed" when the owners declared on September 23, 1991, for the first time, their theory that the highest and best use of the property was use as a restaurant. We understand this to be an argument of surprise.

[2] We believe the trial court could have reasonably concluded from the record that any surprise was of the State's own making. The State had, at the beginning of the suit, named Pizza Inn, Inc., a restaurant, as lessee of the property and requested issuance and

service of citation upon that defendant. The owners objected to interrogatories about Pizza Inn, Inc. on the ground that they exceeded the maximum number of thirty interrogatories under Texas Rule of Civil Procedure 168. The State apparently abandoned the matter. Moreover, the owners had never designated any use as being their view of the highest and best use; it was not a question of a change in theory on their part. So far as our record reveals, no diligence was shown by the State in enforcing a response to their interrogatory, in this particular, until immediately before the thirty-day limit of Rule 166b(6)(b). The motion did not aver that the State was surprised by the answer to its interrogatory. The owners' response was timely under the parties' agreement, and the State elected to rely on its agreement as to supplementation rather than upon enforcement of Rule 166b. We mention the foregoing only *as possible* reasons the trial court *might* have considered in declining to find good cause for late supplementation by the State.

Nothing in the record suggests the actual basis for the trial court's action in that regard; indeed, we do not have before us a statement of facts reflecting what transpired in the hearing on the State's motion. In these circumstances, we cannot find the trial court abused its discretion. *See Landon v. John-Paul Budinger, Inc.*, 724 S.W.2d 931, 940 (Tex. App.-Austin 1987, no writ).

[3] Similarly, the record is silent as to the trial court's reasoning in denying the State's alternative request for continuance. The court might have reasoned that to grant the continuance would subvert the parties' agreement or the purposes of Rule 166b regarding supplementation, or the court might have refused a continuance on the ground that the State's application for continuance was not supported by the required affidavit as to the matters stated in Rule 252. In these circumstances, we cannot find the trial court abused its discretion in denying the requested continuance as an

alternative to late supplementation by the State. *See Landon*, 724 S.W.2d at 940-41.

[4] The State moved a second time for leave of court to supply late supplementa-

tion, or for a continuance in the alternative, which the trial court also declined to grant. The motion basically tracks the first motion filed by the State. The trial court declined to rule on the motion on the ground that the State had received a full hearing in connection with its first motion. We have no doubt that the trial court had the *power* to reconsider the matter after a hearing and to order the State's requested relief. The question, however, is whether the court abused its discretion in declining to do so when the substance of the two motions was the same. We hold the record does not demonstrate an abuse of discretion in the circumstances. The same reasoning applies to the State's second motion for continuance, and we hold accordingly.

For the reasons given, we overrule the State's points of error one, two, and three.

THE "SCHMIDT FACTORS"

In point of error four, the State complains the trial court erroneously declined to submit the State's requested instructions, which would have directed the jury not to award compensation for the following: (1) injury that the owners shared with the community; (2) loss or decrease in traffic volume; (3) increased circuity of travel in reaching the property; (4) impairment of ingress and egress to the property; and (5) inconvenience or annoyance caused by construction. In point of error five, the State complains the trial court erroneously overruled the State's objection to submission of the charge without these instructions.

The record indicates that the State did not purport to condemn any of the owners' property except a narrow strip across their tract where it abutted the right-of-way line of Highway 183. Similarly, the record indicates that

the owners did not contend that any of their *other* property had been taken or injured, either by way of inclusion in the State's condemnation petition or by inverse condemnation. Specifically, the owners did not contend that the State had taken or injured the incorporeal items of property mentioned in the State's requested instructions, nor did the owners request compensation therefor. Consequently, the requested instructions bore on no issue material to the case.

[5] The evidence regarding loss of traffic volume, increased circuity of travel, impairment of ingress and egress, and construction interference was given to explain the opinion of the owner's expert witness concerning market value how these various factors would affect willing sellers and willing buyers in arriving at an agreeable price for the property remaining after the strip was taken. In *Schmidt*, we held similar testimony admissible for the limited purpose indicated. *See Schmidt*, 805 S.W.2d at 35. The instructions requested by

the State would have misled the jury as to the applicable law. We hold the trial court did not err; consequently, we overrule points of error four and five.

[6] In point of error six, the State complains the trial court erred in refusing to include in the charge the State's requested jury question number two, which pertained to community damages. The State's formulation of the question was as follows:

> *Excluding* increase in value, if any, and decrease in value, if any, by reason of benefits or injuries *received by the defendants in common with the community generally and not peculiar to them and connected with their ownership, use, and enjoyment of the particular tract of land across which the strip of land has been condemned*, and taking into consideration the uses to which the strip condemned is to be subjected, what do [you] find to be the decrease in market value, if any, of the remainder of the Defendants' tract of land immediately after the taking of the strip condemned for highway purposes?
>
> Answer in Dollars and Cents, if any: $_____

(emphasis added). This instruction follows closely the form suggested by the supreme court in *State v. Carpenter*, 89 S.W.2d 194, 201 (Tex. 1936). The trial court refused

the State's requested question and submitted the following instead:

> What was the decrease in the Fair Market Value of the remaining 18,750 square
>
> ----- 232 -----
>
> feet of the Allen's [sic] land, as improved, immediately after the taking on January 23, 1990, taking into consideration the effect of the condemnation on the value of the remaining property?
>
> Answer in Dollars and Cents: $_____

The charge instructed the jury as follows:

> "Fair market value" means the price which the property would bring if offered for sale by one who desired, but is not obliged to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adapted and for which it either is or in all reasonable probability will become available within the reasonable future.

The special question submitted by the trial court appears to conform to the broad-form submission discussed in *Callejo v. Brazos Electric Power Cooperative, Inc.*, 755 S.W.2d 73 (Tex. 1988), a form of submission superseding that recommended in *Carpenter*.

The State's argument under its point of error six is not directed so much at the form of the submission as it is to a precept included in the State's requested jury question but omitted from the special question and instruction given in the court's charge. We refer to the precept that in assessing an owner's injury or benefit one must exclude from consideration "an injury or benefit that the property owner experiences in common with the community," limiting the consideration to "an injury or benefit that is peculiar to the property owner and that relates to [his] ownership, use, or employment of the particular parcel of real property" condemned. Tex. Prop. Code Ann. § 21.042(c), (d) (West 1984).

The State argues in substance that the precept should have been included in the court's charge because it arose in the evidence. This evidence of "community damages" consisted, the State argues, of that evidence which pertained to loss or decrease in traffic volume, increased circuity of travel in reaching the property,

impairment of ingress and egress, and inconvenience or annoyance caused by construction. (We reiterate that such evidence was given solely to explain an expert's opinion testimony as to the market value of the owner's remaining property.) The matter being thus raised by the evidence, the State concludes, the court was legally bound to instruct the jury regarding the legal precept stated in sections 21.042(c) and (d) of the Property Code. We disagree entirely.

[7] The State's contention is founded upon a misunderstanding of what constitutes "community damages." The State's theory rests upon the idea that travelers on Highway 183, during its reconstruction and afterwards, will be inconvenienced, annoyed, or otherwise affected by the same construction activities, increased circuity of travel, and changes in traffic volume, ingress, and egress. This is undoubtedly true in a sense. To constitute "community damages," however, the claimed injury must be of the same "*nature* as is suffered from

that cause in common with other *property owners* in the same community or section." *Fort Worth Improvement Dist. No. 1 v. City of Fort Worth*, 158 S.W. 164, 168 (Tex. 1913) (emphasis added).

The crux of the issue is this: Unlike others in the community, the owners claim to have suffered an invasion of their proprietary interest-a strip of their land has been severed and taken from them, with resulting injury to the market value of their remaining property. In this they are decidedly different from persons in the community whose property has *not* been taken. The damages the owners claim, regarding the market value of their remaining property, are not of the same nature as any inconvenience or annoyance suffered by someone who merely travels the highway but whose property has *not* been taken. Those damages are peculiar to the owners and others similarly situated along Highway 183. They are *not* "community damages." *Id.* 158 S.W. at 169; *Texarkana & N.W. Ry. v. Goldberg*, 68 Tex. 685, 5. S.W.

824, 826 (1887) (cited in *Texas Reports* as *Texas & N.O. Ry. v. Goldberg*, 68 Tex. 685, 5 S.W. 824 (1887)).

Because there was no evidence of "community damages," there was no evidence to

justify submission of the legal precept stated in sections 21.042(c) and (d). We hold, therefore, that the trial court did not err in refusing to submit that precept. Accordingly we overrule the State's sixth point of error.

In its seventh point of error, the State complains the trial court erred in admitting in evidence the matters described above because these was evidence of general community damages. For the reasons given previously, we overrule the point of error.

Finding no error as assigned, we affirm the trial-court judgment.

John Powers, Justice

[Before Justices Powers, Aboussie and B. A. Smith]

Affirmed

Filed: May 5, 1993

[Publish]

THE SUPREME COURT OF TEXAS
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Austin, Texas 78711
John T. Adams, Clerk

February 2, 1994

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RE: Case No. D-3773

Style: STATE OF TEXAS and CITY OF AUSTIN v. CENTENNIAL MORTGAGE CORPORATION, SUCCESSOR IN INTEREST TO GRAND CENTRAL STATION SHOPPING CENTER, LTD.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS, CLERK

Peggy Littlefield

Peggy Littlefield,
Chief Deputy Clerk

867 S.W.2d 783 (Tex. 1993)

STATE of Texas and City

of Austin, Petitioners,

v.

CENTENNIAL MORTGAGE CORPORATION,

Successor in Interest to Grand

Central Station Shopping Center, Ltd.,

Respondent.

No. D-3773

Supreme Court of Texas.

November 24, 1993.

Rehearing Overruled Feb. 2, 1994.

PER CURIAM

This case arises out of the condemnation of part of a commercial tract in order to convert U.S. Highway 183 in Austin into an elevated, controlled-access freeway. The project is described more completely in *State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993). Like *Schmidt*, this case involves the measure of damages due a landowner, not for the strip of land actually taken, but for a loss in market value of the remainder due to decreased accessibility and visibility, circuity of travel, and interim construction inconvenience--all factors held unrecoverable as a rule in *Schmidt*. Unlike *Schmidt*, however, this case involves claims for damages based on other factors,

including the need to replace detention ponds and the loss of a number of parking spaces. For this reason, we reverse in part the judgment of the lower courts and remand this action for new trial in accord with our opinion in *Schmidt*.

The State of Texas and the City of Austin brought suit to condemn a 10,433-square-foot strip of land from a 9.2-acre tract located at the corner of Peyton Gin and U.S. Highway 183, improved with a 109,000-square-foot shopping center, and owned by Centennial Mortgage Corporation, as successor in interest to Grand Central Station Shopping Center. The award for the strip taken is no longer in dispute. Centennial put on evidence to show the fair market value of the whole property before the condemnation, and the fair market value of the remainder, considering the effects of the condemnation. Its experts testified that this decrease in fair market value reflected the attributes of the remainder property that a would-be purchaser would consider, including the cost to cure the lost detention ponds, the creased visibility, the decreased accessibility, the increased risk of owning the property, the fact that the property would be subject to three to five years of construction and would, at the end, be adjacent to an elevated,

limited-access freeway. The State unsuccessfully objected to the admission of this evidence. The jury found that the fair market value of the strip taken was $162,600, and the decrease in fair market value of the remainder was $1,480,000. After subtracting the amount previously paid based on the award of the special commissioners, $110,078, the trial court rendered judgment for $1,532,622, plus interest. The court of appeals affirmed. 867 S.W.2d 769.

The State contends that the admission of evidence of damages held noncompensable in *Schmidt* was error, that this inadmissible evidence was the only evidence supporting an award of damages to the remainder, and that the trial court's judgment should be reformed to delete the award of damages for the remainder. We do not agree. Unlike *Schmidt*, this case involves claims of damages which may be compensable, *viz.*, the cost of replacing detention ponds and other improvements formerly located on the condemned strip of land, and the

resulting loss of parking spaces on the remainder. The parties agreed that the cost for rebuilding the ponds and replacing other items was $110,000, but do not cite us to any evidence or agreement which would establish, as a matter of law, possible damages flowing from the lost parking spaces.

The landowners may have recouped part of the initial cost of building the retention ponds, to the extent the award for the condemned strip reflected an increase in value due the construction of the ponds thereon. But even assuming that the value awarded for the strip of land included some amount for this improvement, this amount would not necessarily compensate the landowner for all out-of-pocket expenses for building or rebuilding retention ponds. Damages due to required modifications to the remainder, as a result of the condemnation, or damages due to a loss of improvements on the remainder because of the condemnation may, on a proper showing, be compensable. While the parties agreed on $110,000

as the cost of rebuilding the retention ponds, we cannot determine what further portion of damages may also be compensable.

Accordingly, a majority of the Court, without hearing oral argument, grants the application for writ of error, reverses the judgment of the court of appeals, 867 S.W.2d 382, and remands the case to the trial court for further proceedings in light of our opinion in *Schmidt*.

867 S.W.2d 382 (Tex.App--Austin 1993)

STATE of Texas and City

of Austin, Appellants,

v.

CENTENNIAL MORTGAGE CORPORATION,

Successor in Interest to

Grand Central Station Shopping

Center, Ltd., Appellee

No. 3-91-099-CV.

Court of Appeals of Texas,

Austin.

Feb. 17, 1993.

Released for Publication Dec. 8, 1993.

This appeal arises from a statutory condemnation case, wherein a portion of the landowner's property was taken for the expansion of U.S. Highway 183. The trial court rendered judgment on the jury's ver-

dict awarding the landowner the value of the part taken as well as damages to the remaining property. The condemnors, State of Texas and City of Austin (collectively, the "State"), appeal, claiming errors in various evidentiary rulings by the court and in the trial court's handling of jury deliberations. We will affirm the judgment of the trial court.

BACKGROUND

Appellee, Centennial Mortgage Corporation ("Centennial"),[1] owned a large tract of land, improved by a 109,000 square-foot shopping center, located on and with full access to the main travel lanes of U.S. Highway

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[1] Centennial Mortgage Corporation is the successor-in-interest to Grand Central Station Shopping Center, Ltd.

183 in Austin, Texas. Centennial's property also had access to Peyton Gin Road and Ohlen Road.

The State condemned a 10,433 square-foot parcel of land from the front of Centennial's property for the widening and reconstruction of U.S. Highway 183 into a limited or controlled access freeway with at-grade three-lane frontage roads running both directions and main lanes on pier structures some 32-48 feet above grade in front of the condemned property. The property condemned by the State was necessary for its proposed highway improvement project. The part taken included land used as detention ponds on the shopping-center property. Centennial was required to replace these detention ponds after the condemnation at a cost agreed to by both parties of $110,000.00. Replacement of the detention ponds eliminated approximately 48 parking spaces in Centennial's parking lot.

Centennial presented two appraisal experts who testified as to the market value of the part taken and the

damage to the remainder property caused by the condemnation project. This expert opinion testimony was supported by detailed market data that was presented to the jury in both sworn testimony and trial exhibits. These appraisal expert witnesses testified that the decrease in the fair market value of the remainder reflected those attributes of the property that a would-be purchaser would consider. This testimony included, among other things, the cost to cure the lost detention ponds, the decreased visibility and decreased accessibility of the remainder, the increased risk of owning the remainder, and the fact that the remainder would be subjected to a 3- to 5- year construction project and would then be located adjacent to an elevated, limited-access freeway.

The State's lone expert witness testified that the proposed highway improvements and construction project would actually enhance the market value of Centennial's remaining property. Further, there was testimony about

the nature and duration of road-construction activities the State planned in front of Centennial's property.

The jury returned a verdict favorable to Centennial, and the State appeals, bringing forth fourteen points of error. In points of error four through thirteen, the State claims that the trial court erred in permitting the introduction of inadmissible testimony. In point of error fourteen, the State complains of the trial court's failure to permit the introduction of certain documentary evidence favorable to the State. And, finally, in points of error one through three, the State contends that certain acts of judicial misconduct deprived it of a fair trial.

DISCUSSION

Admissibility of Evidence

[1] In a series of condemnation cases involving the U.S. Highway 183 project, the State has taken the position that the landowner is attempting to recover statutory condemnation damages that are non-compensable. See *State v. Munday Enters.*, 824 S.W.2d

643 (Tex.App.--Austin 1992, writ requested); *State v. Schmidt*, 805 S.W.2d 25 (Tex.App.--Austin 1991, writ granted).[2] These non-compensable elements generally involve the loss of access to the landowner's

remaining property by the grade elevation necessary for the condemnation project, the loss of visibility resulting to the remainder property as a result of the elevated roadway, and the construction disruption and inconvenience that results to the remainder property. We held in both *Schmidt* and *Munday* that, while the value of these items is not recoverable as a separate item of damage, evidence of their value is admissible on the question of diminution in the fair market value of the landowner's remainder property. *Munday*, 824 S.W.2d at 647; *Schmidt*, 805 S.W.2d at 35. In the instant cause, the

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[2] *See also* our most recent decision in *Honorable Dan Morales, Attorney General of the State of Texas v. Chrysler Realty*, 843 S.W.2d 275 (Tex. App.--Austin 1992, n.w.h.)

trial court permitted the introduction of this type of evidence. We reaffirm our prior holdings that this evidence is admissible on the question of remainder damages. Accordingly, the State's points of error four through thirteen are overruled.

[2] In its fourteenth point of error, the State complains that the trial court erred in excluding a time-and-distance study done by one of the State's witnesses. The trial court excluded the proffered exhibit on the basis that it had not been properly identified pursuant to a discovery request from centennial. The trial court found that, because the State had violated its duty to supplement its answers to Centennial's interrogatories, the evidence should be excluded. *See* TEX.R.CIV.P. 215(5); *E.F. Hutton & Co., Inc. v. Youngblood*, 741 S.W.2d 363, 364 (Tex.1987); *Gutierrez v. Dallas Indep. Sch. Dist.*, 729 S.W.2d 691, 693 (Tex.1987). The proper standard for reviewing the appropriateness of the trial court's admission or exclusion of trial evidence is abuse of

discretion. Since there is no showing in the record of any "good cause" for the State's failure to supplement written interrogatories, we are unable to say that the trial court abused its discretion. Accordingly, the State's fourteenth point of error is overruled.

Jury Deliberations

[3] The State's first three points of error involve some unfortunate occurrences after the jury retired to deliberate. As the trial judge and the bailiff were assembling some eighty trial exhibits to send back into the jury room, they determined that one of the exhibits, State's Exhibit Number 4, was missing.[3] At this point, the trial judge summoned trial counsel for all parties to return to the courtroom.

Apparently, counsel for Centennial arrived first and the mystery regarding Centennial's Exhibit Number 40 was clarified when it was discovered that the exhibit

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[3] There was also a problem with Centennial's Exhibit Number 40.

had never been formally introduced in evidence. At this juncture, the bailiff took Centennial's exhibits into the jury room.

When the State's counsel arrived, everyone determined that the missing exhibit must have been inadvertently removed by one of the expert witnesses.[4] Upon retrieving the missing exhibit, the State's exhibits were likewise taken into the jury room. From start to finish, according to the notes of the trial judge, the whole incident consumed less than forty-five minutes.

The State moved for a mistrial on the basis that sending Centennial's exhibits into the jury room first constituted an impermissible comment on the weight of the evidence. In overruling the State's motion for mistrial, the trial judge observed, on the record, that at the time the State's exhibits were taken into the jury

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[4] Nothing in the record suggests that the missing exhibit was removed through any type of intentional design; the removal was purely the result of an accidental oversight.

room, the jury was still assembling the evidence, had requested the use of an easel from the court room, and had not even begun its deliberations.

The State, in three related points of error, alleges misconduct on the part of the trial judge in failing to send all the trial exhibits to the jury simultaneously; in entering the jury room and making an unauthorized determination on the extent of the jury's deliberations; and in communicating with the jury other than in open court. We have examined each of these arguments by the State and find them to be meritless. The record clearly reveals that the trial judge committed no act of violation of the Texas Rules of Civil Procedure, and the State cannot show any

harm from any of the conduct alleged. There is no showing in the record of any harm to the State from any actions of the trial judge who, as best we can determine, was making a good faith effort to give both sides the

fairest jury trial possible. We overrule the State's points of error one through three.

CONCLUSION

Finding no error, we affirm the judgment of the trial court in all respects.

Supreme Court, U.S.
FILED
JUN 16 1994
OFFICE OF THE CLERK

NO. 93-1860

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

AUSTEX, LTD., MUNDAY ENTERPRISES,
DONNIE RUTH MOORE EDWARDS, TOM ALLEN,
CENTENNIAL MORTGAGE, ET AL.,
Petitioners

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Does the United States Supreme Court have jurisdiction to review the judgments of the Supreme Court of the State of Texas pursuant to 28 U.S.C. §1257(a) (1988) where the Texas Supreme Court has neither passed on the federal constitutional issues urged before this Court nor were those issues properly raised in the State court?

Does the United States Supreme Court have jurisdiction to review the judgments of the Texas Supreme Court which were remanded to the trial court for a new trial?

Did the Texas Supreme Court, in following the rule of the United States Supreme Court announced in *Campbell v. United States*, 266 U.S. 368 (1924), violate the Just Compensation Clause of the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Respondents adopt the statement of Petitioners with respect to the parties as they appeared before the Supreme Court of Texas.

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NO. 93-1860

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

AUSTEX, LTD., MUNDAY ENTERPRISES,
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Petitioners

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

OPINIONS BELOW

The "Opinions of Lower Courts" section of the Petition For Writ of Certiorari accurately summarizes the lower court proceedings.

JURISDICTION

Under the circumstances presented here, 28 U.S.C. §1257(a) (1988) does not confer jurisdiction on this Court as alleged by Petitioners. This Court lacks jurisdiction to review the Texas Supreme Court judgments because (1) they were based entirely upon Texas statutory law and judicial precedent, (2) the Federal Constitutional issues were neither decided by nor raised in the Texas courts, and (3) the decisions are consistent with this Court's precedent on the pertinent Federal

Constitutional issues. Additionally, the decisions which were remanded for a new trial[1] are not ripe for review.

The Petitioners attempted to raise the Federal Constitutional issues they complain of now for the first time on motions for rehearing to the Texas Supreme Court, which were overruled without comment.[2] Under Texas law, a Constitutional challenge must be made at the trial court level unless the challenge constitutes fundamental error. *Pedraza v. Tibbs*, 826 S.W.2d 695, 698 (Tex. App.--Houston [1st Dist.] 1992, writ denied). In the absence of fundamental error, a Constitutional challenge may not be raised for the first time in the Texas Supreme Court, especially on a motion for rehearing. *Johnson v. Lynaugh*, 796 S.W.2d 705, 707 (Tex. 1990); *Watson v. Glen Falls Ins. Co.*, 505 S.W.2d 793, 797 (Tex. 1974); Tex. R. App. P. 131(e).

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[1] *State v. Allen*, 870 S.W.2d 1 (Tex. 1994); *State v. Centennial*, 867 S.W.2d 783 (Tex. 1993); and *State v. Munday Enterprises*, 868 S.W.2d 319 (Tex. 1993).

[2] Pet. at 8, 9; Pet. App. at A-4, A-69, A-70, A-111, A-112, A-124, A-125, A-153, A-154.

Petitioners do not assert fundamental error, nor could they on these facts. "Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas." *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982).

This Court addressed these very jurisdictional issues in *Yee v. Escondido*, __ U.S. __, 112 S.Ct. 1522 (1992). In *Yee*, petitioners attempted to raise a substantive due process claim for the first time in their Petition for Review which was denied by the California Supreme Court. Noting that petitioners did not raise a substantive due process claim in the state courts and that no state court had addressed such a claim, this Court held that it

> has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S.Ct. 2317, 2321-2323, 76 L.Ed.2d 527 (1983). While we have expressed inconsistent views as to whether this rule is

> jurisdictional or prudential in cases arising from state courts, see *ibid.*, we need not resolve the question here. (In cases arising from federal courts, the rule is prudential only. See, *e.g.*, *Carlson v. Green*, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1470, n. 2, 64 L.Ed.2d 15 (1980).) Even if the rule were prudential, we would adhere to it in this case. Because Petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here. *Id.* at 1531.

Comparatively, this Court should be even more reluctant to accept jurisdiction where separate, compelling and long-standing state law authorities, both statutory and judicial precedent, support the Texas Supreme Court decisions. An independent and adequate state law ground will defeat this Court's jurisdiction *even where a question of federal law is decided by a state court* (which is, of course, denied here by Respondents). *Coleman v. Thompson*, __ U.S. __, __, 111 S.Ct. 2546, 2553-54 (1991), *citing Fox Film Corp. v. Muller*, 296 U.S. 207, 210, (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed 635 (1872).

The *Allen*, *Centennial* and *Munday* cases were remanded for new trials and, therefore, are not ripe for review. *O'Dell v. Espinosa*, 456 U.S. 430 (1982). The Petitioners cite *Cox Broadcasting*[3] to support their contention that the Court should exercise discretionary authority. However, such reliance is misplaced for two reasons; first, because of jurisdictional reasons previously discussed; and second, a compelling federal policy is absent on these facts since the holdings of the Texas Supreme Court are consistent with this Court's decision in *Campbell*. Indeed, although the Texas Supreme Court expressly disavowed analysis from a Fifth Amendment perspective in its *Austex* decision,[4] it nevertheless followed the *Campbell* rule.

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[3] 420 U.S. 469 (1975).

[4] *State v. Austex, Ltd.*, 867 S.W.2d 769 (Tex. 1993)

RESPONSE TO PETITIONERS' STATEMENT

Petitioners' tracts of land were situated on United States Highway 183 ("U.S. 183"). At that time, U.S. 183 consisted of six lanes of traffic, three each for northbound and southbound traffic separated by a grassy median. Approximately ten years prior to trial, the City Council of Austin, Texas petitioned the Texas Department of Transportation to alleviate traffic congestion on U.S. 183. Petitioners' lands were acquired to meet federal guidelines for highway construction and, in certain of the causes below, to provide additional area for road construction incident to the highway project which will improve U.S. 183. When completed, the project will enable traffic to reach adjacent properties, including Petitioners' properties, through a system of frontage or access roads consisting of three southbound and three northbound lanes. The access roads are virtually identical to the original U.S. 183 except that they will be curbed and guttered.

Six main highway lanes, three each for northbound and southbound traffic, will be elevated above ground level. A system of entry and exit ramps will connect the access roads to the main lanes.

At trial, the Petitioners in *Allen*, *Centennial*, and *Munday* suffered damages to their property not taken (the "remainder") which was peculiar to their respective remainders and not attributable to the project generally or the proposed use of the land taken from others. However, all of the Petitioners sought damages they alleged were due to (1) diversion of traffic, (2) increased circuity of travel to the property, (3) lessened visibility to passersby, and (4) inconvenience of construction activities. Respondents objected to the admission of such evidence because it pertained to damages not recognized under Texas law. Contrary to the Petitioners' characterization of the Texas Supreme Court's holding in *Austex*,[5] the Texas Supreme Court

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[5] Pet. at 8.

unanimously held, citing authorities spanning more than 100 years of Texas jurisprudence, that (1) the damages claimed by Petitioners did not amount to a taking or damaging of property that is compensable in an inverse condemnation case; (2) the general rule in inverse condemnation cases and condemnation cases has been the same with respect to the elements of injury; (3) the court had never allowed recovery for severance damages like those claimed by Petitioners; (4) the damages claimed by Petitioners did not result from the taking of their property, but from the State's new use of its existing right-of-way and of property taken from other landowners to widen it; and, (5) the damages claimed by Petitioners were community in nature and, therefore, not compensable under the Texas condemnation statute.

REASONS FOR DENYING WRIT OF CERTIORARI

I. THE TEXAS SUPREME COURT DECISIONS WERE BASED ENTIRELY ON STATE LAW.

In *Austex*[6] a unanimous Texas Supreme Court adopted the federal rule announced by this Court in *Campbell v. United States*, 266 U.S. 368 (1924). This being so, it can hardly be seriously argued that this Court's criteria for granting certiorari have been met. Sup. Ct. R. 10, 28 U.S.C. (1994). Not only do Petitioners misconstrue *Campbell* in urging this Court's grant of certiorari, but they ignore the fact that the Texas Supreme Court's decision rested not on *Campbell* but on the Texas Property Code,[7] its prior decision in *State v. Clark*,[8] and a myriad of Texas Supreme Court and appellate decisions construing §21.042(c) and (d) of the Texas

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[6] *Austex, Ltd.*, 867 S.W.2d at 778, 779.

[7] Tex. Prop. Code Ann. §21.042 (Vernon 1984).

[8] 336 S.W.2d 612 (Tex. 1960).

Property Code in the context of community injury and benefit. *Austex, Ltd.*, 867 S.W.2d at 777, 781.

Section 21.042 of the Texas Property Code is the foundation upon which the entire body of Texas law rests in condemnation cases. It was the application of subsections (c) and (d) of §21.042 which compelled the decisions of the Texas Supreme Court below. As noted by the Texas Supreme Court:

> The State contends that Schmidt and Austex are not entitled to severance damages because the damages they claim did not result from the taking of their property, but from the State's new use of its existing right-of-way and of property taken from other owners to widen it. We agree.
>
> Section 21.042(c) requires consideration of "the effect of the condemnation on the value of the property owner's remaining property." *The effect of the State's condemnation on each tract in the present cases--that is, the taking of a small strip of property--is different from the effect of the State's change in Highway 183. The statute allows recovery only for the former.* *Austex, Ltd.* 867 S.W.2d at 777, 778. (Emphasis added).

Similarly, in *Austex* the Texas Supreme Court held that the damages complained of by Petitioners were not an "effect of the condemnation on the value of the property owner's remaining property" within the cognizance of §21.042(c) because they are not allowed by §21.042(d). *Id.* at 781. As stated by the court:

> The diversion of traffic, inconvenience of access, impaired visibility of ground-level buildings, and disruption of construction activities of which Schmidt and Austex complain are, by their nature, a consequence of the change in Highway 183 shared by the entire area through which it runs. While one or more of these elements of injury could affect the Schmidt and Austex tracts in some special, unique way, different from the effect on the surrounding area, there is no claim here that they do. Schmidt and Austex may be impacted more severely than some others in the area, but the difference is one of degree and not of kind. Thus, we agree with the State that the severance damages claimed are not allowed by §21.042(c). *Id.*

Thus, it was Texas law which was and is determinative of the issues presented here.

II. THE TEXAS SUPREME COURT DECISIONS ARE IN ACCORD WITH DECISIONS OF THIS COURT INTERPRETING THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN PARTIAL TAKING CASES WHERE THE DAMAGES TO THE REMAINING LAND RESULT FROM THE USE TO BE MADE OF THE LANDS ACQUIRED FROM OTHERS.

Petitioners claim damages to their remaining land as a result of the use to be made of the lands acquired from others. *Campbell* is the law of the land regarding the applicability of the Fifth Amendment to the facts of these partial taking cases where the compensability of consequential damages related to the public project giving rise to the taking is concerned. *Campbell*, 266 U.S. at 369-71. In *Campbell*, this Court acknowledged that the petitioner, John V. Campbell, on the taking of a part of his land, "[b]ecame entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of the land taken and the damages inflicted by the taking - such a sum as would put him in as good a position pecuniarily as he would have been

if his property had not been taken. (Citation omitted.) But he was not entitled to have more than that." *Campbell*, 266 U.S. at 371. The Court reasoned that he *was not* entitled to compensation for damages to his remaining land *by reason of the uses to be made of lands acquired from others for the same project*. As stated by this Court:

> [p]laintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from Plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. *It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the Fifth Amendment giving just compensation does not apply*; and there is no statute applicable in this case that enlarges the constitutional right. *Id.* (Emphasis added.)

Campbell establishes the rule that the threshold of the Fifth Amendment is not crossed where compensation is claimed for diminution in value attributable not to the taking but to the

proposed use of the lands taken from others. *Campbell*, 266 U.S. at 371. The point on which *Campbell* turns is whether the proposed use of the lands taken from others *constitutes a taking of the property owner's property. Id. citing Richards v. Washington Terminal Co.*, 233 U.S. 546, 554 (1914) (Emphasis added). In *Richards*, this Court stated:

> [a]ny diminution of the value of property *not directly invaded nor peculiarly affected*, but *sharing in the common burden of incidental damages* arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. *Richards*, 233 U.S. at 554. (Emphasis added).

The holding in *Campbell* is plain and well-reasoned:

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others

> for the same undertaking. *Campbell*, 266 U.S. at 372.

Hence, the damages awarded to a condemnee precipitated by a taking are distinguished from the damages which may accrue on account of the public works or project for which the lands are taken. The Fifth Amendment applies only to the former. Contrary to Petitioners' characterization, the Texas statute as applied by its Supreme Court is in harmony with this Court's precedents. The proposed use by the State of Texas of its own highway right-of-way and of lands taken from others to widen the highway does not constitute a taking of Petitioners' property for which compensation is due under the Fifth Amendment.[9]

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[9] Petitioners' reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. So. Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886 (1992) demonstrates that they have missed the Constitutional point. Petitioners confuse the compensability of negative effects of the taking on the property owner's remaining property (for which compensation is required under the Fifth Amendment) with effects on the property owner's remaining property caused by the taking of property of others for the same project (for which compensation is not required by the Fifth Amendment). Applying the rules of *Loretto* and *Lucas*, it is apparent that the diminution in value of Petitioners' remainder does not trigger a taking under the Fifth Amendment because it suffers neither a physical invasion nor a denial of all beneficial or productive use of the land.

III. THE TEXAS SUPREME COURT DECISIONS ARE IN ACCORD WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As an initial matter, Petitioners misstate the appropriate standard of review.[10] Petitioners argue for a heightened standard of review reserved for protected classes citing this Court's decision in *City of Cleburne, Tex. v. Cleburne Living Center*.[11] The heightened scrutiny standard is not applicable to this case. It is nowhere asserted, and could not be argued, that either party is within a protected class demanding heightened scrutiny. The appropriate rule is "that legislation is *presumed* to be valid and will be sustained if the classification drawn by the statute is *rationally related* to a legitimate state interest. *Heller v. Doe by Doe*, __ U.S. __, __, 113 S.Ct. 2637, 2642 (1993). (Emphasis added).

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[10] Pet. at p. 14.

[11] 473 U.S. 432 (1985)

The Texas statutes which prescribe the evidentiary confines and the measure of damages in condemnation cases,[12] and which form the bases of the holdings of the Texas Supreme Court below, precisely mirror the rules announced by this Court. Indeed, the holding of *Campbell* is exactly the holding of the Texas Supreme Court in *Austex* regarding §21.042(c); that is, "the effect of the condemnation on the value of the property owner's remaining property" includes those damages attributable to the acquisition, not those damages attributable to the use of adjoining lands of others for the same undertaking. *Campbell*, 266 U.S. at 371, 372. Similarly, §21.042(d) of the Texas Property Code regarding community damages precisely mirrors the rule of this Court in *Richards*. *Richards*, 233 U.S. at 554.

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[12] Tex. Prop. Code Ann. §21.042(b) and (c) (Vernon 1984) discussed *infra*. at pp. 13-18.

CONCLUSION

The decisions of the Texas Supreme Court were based on Texas law. No federal issues were decided by or presented to the Texas Supreme Court. The state issues presented to the Texas Supreme Court were decided in harmony with this Court's holdings in *Campbell* and *Heller* with respect to Petitioners' Fifth and Fourteenth Amendment issues, respectively. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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